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A TREATISE
ON THE LAW OF
TRUSTS AND TRUST SETTLEMENTS
INCLUDING ITS APPLICATION TO
PRACTICAL CONVEYANCING.

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A TREATISE
ON THE
LAW OF TRUSTS AND TRUST SETTLEMENTS.

CHAPTER XXIII.
OF THE LIABILITIES INCURRED BY TRUSTEES TO
CREDITORS OF THE TRUST ESTATE.

WE have thought it desirable, even at the risk of some repetition, to treat more systematically and fully of the subject of the liabilities of trustees than the example of other writers on this class of questions would seem to warrant. But the increasing practical importance of questions affecting the personal interests of trustees, and the uncertainty which pervades this branch of the law, call for a copious, and, as far as may be, an exhaustive treatment of the subject. The subject of liability naturally divides itself into the two main questions which are discussed in this and the next chapter: *First*, the question of liability to creditors of the estate,—that is, to parties whose claim is not founded on the trust settlement, but upon obligations undertaken by the trustee expressly or constructively; and, *secondly*, the trustee's liability to the truster himself, or to the beneficiaries pointed out by the trust settlement (*a*). In the first class of questions the liability of the trustee depends solely on the nature of the obligation which he has undertaken to the party seeking to make him personally responsible; in the second, it is dependent on

General Division of the subject of Liability.

(*a*) See Chapter XXIV., *infra*, p. 25.

the nature of the diligence prestatable from persons holding the fiduciary office, viewed in connection with the powers conferred and obligations imposed by the deed of settlement. This classification would naturally embrace questions as to the liabilities of trustees for law expenses; but as the liability of trustees for the expenses of litigation is controlled by the operation of the equitable jurisdiction of the Court—an element which does not enter into the consideration of liabilities arising from contract, or from the relation of trustee and beneficiary—it has been thought proper to reserve that branch of the subject for separate discussion. The liability of trustees for expenses will accordingly form the subject of the *third* and concluding chapter on the responsibility of trustees (*a*).

Personal Liability to Creditors, distinguished from Personal Obligation to make Funds forthcoming.

To proceed with the subject of the liability undertaken to creditors of the estate, it is proper to notice in the outset, that as we are dealing at present with the subject of liability arising from personal obligation, we necessarily exclude from consideration, except in the way of a passing reference, all questions as to the liability of the trust estate for the debts of the truster. A trustee is of course liable, in his character as a general representative of the truster, to fulfil the obligations of the latter. But those are obligations which can only be enforced against him *as trustee*; in other words, they are enforceable against the trust estate in an action in which the trustee is a necessary defender. In treating of the duties of the trustee (*b*), we have already had occasion to consider the obligations incumbent upon him which respect the preservation of the estate, its equitable distribution amongst those who are interested, and the rules according to which the relative interests of the several classes of beneficiaries may be affected by the diligence of creditors. The obligation to pay or perform on behalf of the truster only assumes the form of a personal liability when the trustee deals *inequitably* with the creditors of the estate.

Trustees may incur Liability for Truster's Obligations, either (1) by adopting them, or (2) by putting away the Funds.

As preliminary to the discussion of the more important questions as to the liabilities of trustees *ex obligatione*, we may refer, but very briefly (for this point also has been dealt with in the chapters on duties), to the class of cases in which trustees have been held personally liable for the settlor's engagements, either on the principle

(*a*) Chap. XXV. (*b*) Chap. XVI. Sect. III., and Chap. XIX. Sect. II.

of novation in respect of their own adoption of current contracts, or on the principle of liability for negligence in illegally or inequitably disposing of the funds which they were bound to make available to all the creditors of the trust estate.

On the first point, it is sufficient to say, that the liability of trustees in respect of their adoption of subsisting contracts is subject to the operation of the same rules of law which determine the liability of trustees for contracts of their own making. The cases will be noticed in treating of the main question.

Trustee adopting Obligation makes it his own.

As to the second ground of liability above mentioned, the rule of law may be sufficiently illustrated by referring to a few of the leading cases (a). For example, in *Young v. Johnston's Trustees* (b), gratuitous trustees were held liable for payment of a debt due to one of the trustor's creditors, because, at a time when the estate would have been sufficient, if realized, for the payment of all the creditors, they had chosen to keep up the debts upon the estate, and had granted a bond in security of one debt, instead of providing equally for both. The amount realized by the sale of the estate having proved insufficient for the payment of both creditors, the trustees were justly held liable for the amount of the damage sustained by the unsecured creditor, in consequence of the creation of this illegal preference. In another case, where trustees had been directed to purchase a landed estate with the residue of the testator's funds, to be conveyed by them to his heir, subject to the conditions of a strict entail; and they conveyed the entire succession, without having provided for the payment of an annuity chargeable against the settlor's estate under his contract of marriage; they were held liable in a personal action for the value of the annuity (c). To this principle we may also refer the rule of law, according to which an executor who intromits with the personal

Consequences of denuding before Debts are discharged.

(a) The question here referred to, which is always to a considerable extent mixed up with consideration of *bona fides*, is here viewed in relation to the right of the creditor. In Chapter XXVI. the same question is noticed in connection with the right of the trustee to retain the estate until he can denude with safety; and in Chapter XXIX. the extent of the beneficiary's

right to demand implement (which may be a conflicting right) is the subject of consideration.

(b) *Young v. Johnston's Trs.*, 15 June 1841, 3 D. 1020.

(c) *Cruickshank's Trs. v. Cruickshank*, 24 April 1845, 4 Bell, 179; and see *Aitken v. Reid*, 10 Feb. 1829, 7 S. 390. See *Fraser v. Fraser*, 8 Dec. 1826, 5 S. 105.

estate, without confirmation or making up inventories, is liable to creditors on the passive title of vitious intromission (a).

Effect of Acquiescence.

If, again, in the case of a trust for payment of debts, a creditor does not declare his accession to the trust, and makes no claim under it (b); or if, after acceding, he acquiesces in the decision of the trustee repelling his claim (c),—he is held to be precluded by his own conduct from afterwards seeking to enforce the claim by a personal action against the trustee.

Creditors may insist in any claim against Trustee competent to a Beneficiary.

In virtue of his right to call upon the trustee to make the funds of the truster forthcoming, a creditor of the trust estate may raise in his own name any question of liability, as for negligence or breach of the fiduciary relation, which a beneficiary named in the trust deed might have raised. This principle was clearly recognised in the case of the *Bon Accord Marine Insurance Co.* (d). The directors of a company in which the deceased truster held shares, raised an action against the trustees for the purpose of constituting their claim for calls upon the estate. The question was, What was the value of the estate for which the trustees were bound to account? In the second branch of the case, the trustees were held liable to the company, as creditors, to replace a sum which they had invested on hazardous security, and which had been lost in consequence of their having to sell the security below its value to meet the calls (e). And in the same case, the trustees were not allowed to take credit in accounting with the company for a sum which they had paid as commission to two of their number, who acted as law agents and factors to the trust (f). It will therefore be understood

(a) *Cunningham v. M'Kirdy*, 8 Feb. 1827, 5 S. 315; *M'Eachern v. MacEachern*, 26 Feb. 1833, 11 S. 441; *Forbes v. Forbes*, 12 June 1823, 2 S. 295; *Scott v. Lord Belhaven*, 25 May 1821, 1 S. 30; and cases in *Morrison and Elchies, voce Vitious Intromission*, and 4 Br. Sup. 374, 416, 424, 813; 5 *ibid.* 838. On the question how far confirmation as executor creditor will protect an intromitter not claiming through him, see *Montgomery v. Boswell*, 20 Dec. 1841, 4 D. 332; *Dudgeon v. Dudgeon's Trs.*, 9 Mar. 1844, 6 D. 1015.

(b) *Pagan v. Campbell's Trs.*, 17 Jan. 1823, 2 S. 125.

(c) *Jeffrey v. Ure*, 21 June 1825, 1 W. & S. 565, revg. 2 S. 646. On the subject of acquiescence and delay as barring personal claims against the trustee, see Chap. XXIX., Beneficiary's Right of Action.

(d) *Bon Accord Marine Ins. Co. v. Souter's Trs.*, 18 June 1850, 12 D. 1010, 11 Dec. 1850, 13 D. 295; and see the English cases cited *infra*, pp. 27-29, and 39, upon the liability of the executor as for a due administration.

(e) 13 D. 295. (f) 12 D. 1010.

that the questions of liability to parties beneficially interested, which form the subject of discussion in the next chapter, may also be raised by creditors, in virtue of their right to have the estate made available to them.

We pass now to the consideration of the main question, namely, In what circumstances are trustees to be held personally responsible for the fulfilment of obligations undertaken by them for the benefit of the trust estate? In order still further to narrow the field of discussion, two propositions may be laid down, which, if not self-evident, are at least so well settled in principle and in practice, that no controversy can be raised regarding them. *First*, if a trustee expressly undertake personal responsibility, as by interposing his guarantee to protect the estate from diligence, taking, it may be, an assignation to the debt in his own name (*a*); or by executing a cash-credit bond, "as trustee and individually," to pay whatever sums may be advanced by the bank for the purposes of the trust estate (*b*); or by undertaking a purchase on behalf of his constituent, without declaring the name of the party for whom it is made (*c*); he does, in virtue of the terms of his contract, come under a personal obligation to fulfil it. *Secondly*, by parity of reasoning, if a trustee stipulate in express terms that the trust estate alone, and not he as an individual, shall be responsible for the fulfilment of his contract, he will lie under no higher degree of liability than that implied in warrandice from fact and deed,—that is, he is under obligation to make the trust estate forthcoming to the creditor, to the extent to which it can, consistently with the rights of other creditors, be affected by the contract. In the case of an executory contract,—*e. g.*, a sale upon missives, or an agreement to borrow money,—this is the only kind of liability which a trustee can be asked to undertake (*d*).

If a Trustee is either (1) expressly bound in, or (2) expressly relieved from personal responsibility, the condition is binding.

That an obligation by trustees to repay a loan out of the trust estate, "when and as soon as the state of the funds will permit," does in

Terms which import a personal obligation.

(*a*) *Lawson v. Walker*, 8 Dec. 1845, 8 D. 232.

(*b*) *Commercial Bank v. Sprot*, 27 May 1841, 3 D. 939. See *Carswell v. Irvine*, 15 Jan. 1850, 12 D. 462.

(*c*) *Thomson v. Dudgeon*, 4 June 1851, 13 D. 1029. The appeal in this case did not touch the merits of the decision.

(*d*) See the cases of *Forbes' Trs. v. Mackintosh*, 15 June 1822, 1 S. 535; and *Kelly v. Macindoe*, 6 Mar. 1858, 20 D. 773; where it was settled that the proper warrandice to be granted by trustees, in any deed which they were under obligation to execute, was warrandice from fact and deed.

point of law import a personal liability *to make the estate forthcoming*, was expressly decided in the case of *Aitken v. The Glasgow Road Trs.* (a). In this case, the Sheriff having found that there was no fund or balance in the hands of the trustees which could warrant a decree for the sum concluded for, and therefore sustained the defences, the Court, recalling Lord Medwyn's interlocutor, which was affirmatory of the Sheriff's, remitted to the Lord Ordinary to allow an investigation into the state of the defenders' funds since the date of the contract. "I have no conception," said Lord Justice-Clerk Boyle, "that it was left to the managers of the fund to postpone payment of this claim to any time they pleased. . . . The question is, When is it exigible by the contract? I answer, that it is exigible whenever the funds are sufficient, or would have been sufficient, had the trustees not preferred other claims, or incurred other expenses by works which they were not bound to execute" (b).

Trustees are not liable to Creditors of the Estate for the engagements of their Co-trustees.

A *third* proposition, of very general application to questions between creditors and trustees, is, that trustees are only personally liable in respect of their own individual engagements, and not for those of their co-trustees. For, as a trustee is not bound by the duty of his office to interpose his personal security on behalf of the estate, there is no principle upon which the voluntary and gratuitous engagement of his co-trustee can be made operative against him.

Higgins v. Livingstone.

It is remarkable that, even in the comparatively recent period of the chancellorship of Lord Eldon, this doctrine, so clearly grounded in equity, should have been considered open to question. The point arose in an action by certain of the trustees of the Edinburgh and Glasgow Road Trust against their co-trustees, for relief of obligations undertaken by them, in the names of themselves and the whole other trustees, to creditors who had advanced money for the purposes of the trust. The Court of Session decerned, in the first instance, against the defenders. Lord Eldon, in that spirit of caution which with him was too frequently carried to excess, remitted to the Court below to consider whether there was any principle upon which the mere attendance at meetings, in the execution of the ordinary business of the trust, could be held to import a personal undertaking of liability for written contracts to which the

(a) *Aitken v. Glasgow Road Trs.*, 10 Feb. 1829, 7 S. 390. (b) 7 S. 391.

defenders had not been parties (a). On inquiry and reconsideration, the Court found, as to one of the parties, no acts condescended on sufficient to make him personally liable; and in particular, that his authorizing contracts could not be presumed to be an authority for entering into contracts by which he would be personally bound (b). This judgment was affirmed on appeal.

The speech of Lord Eldon, taken from the notes of the shorthand writer, is reported in Paton's Appeal Cases (c). On principle, as well as on the authority of English decisions (d), Lord Eldon came to the conclusion, 1st, that when trustees state in their contracts that they mean to act in the execution of the trust, *prima facie* this ought not to be taken to make them personally liable; 2dly, notwithstanding the existence of authority for the more sweeping doctrine, that trustees contracting simply with other persons, who do not know whether they have a fund applicable and sufficient for the purpose, should be taken as representing that they had a fund applicable and sufficient, his Lordship was not clear that their liability could be put any higher than this, that if the trustees chose to enter into contracts, the terms of which were to make them personally responsible, they were at liberty to do so, and the contracts would be binding upon them (e); 3dly, that where the trustees confine themselves to the execution of their powers,—*e. g.*, if in this case the trustees had interfered with nothing but the application of the funds which, as parliamentary trustees, they were entitled to raise and apply,—then the resolutions of the majority would bind the other trustees present at the meeting; but, 4thly, if they thought proper to enter upon the consideration of subjects that did not belong to the strict execution of the trust, *there* the acts of a majority of the trustees present at a meeting would not bind the minority; “and if the majority, or any part of it, thought fit to make themselves, by their contracts, personally responsible, it would not be enough to say that, at such a meeting, the majority had bound themselves; but in order to prove that the

Opinion of
Lord Eldon.

(a) *Cunynghame v. Higgins*, 26 June 1802, 4 Paton, 401.

(b) 6 Paton, 245.

(c) *Higgins v. Livingstone*, 1 July 1816, 6 Paton, 244; and see *Ochill Turnpike Trs. v. Horn*, 20 June 1822, 1 S. 551.

(d) See *Horseley v. Bell*, Br. Ch. Ca. 101.

(e) 6 Paton, 253. It will be seen from the sequel, that there is no longer any doubt, in the case of a simple contract, that an indefinite obligation implies personal responsibility.

minority were bound, they must go on to show *by what individual acts, by what species of concurrence, by what kind of homologation, by what kind of approbation, these individuals became parties, not for the execution of the trusts of the Act, but for the execution of the acts for which they were to be made responsible*" (a).

Subject resumed.

We are now in a position to assume, first, that a trustee cannot be rendered personally liable for the trust obligations unless he binds himself; and further, that where the character in which the trustee obliges himself is expressly set forth in the contract, the terms of the contract furnish the criterion of liability. But that which in more recent times has created the whole difficulty in relation to questions of liability, is the use of an indefinite form of obligation,—that is, where the trustees are bound either *simply*, or with the addition of their *designation* as trustees. We are now to show, by an examination of the cases, that the character of the liability incurred by trustees, when they contract under their designation as such, depends upon the nature of the contract. The decisions in reference to the several classes of contracts have been tolerably uniform; and, considering the immense importance to individual interests that the law in this quasi-penal department of civil jurisdiction should be uniformly interpreted, it is some satisfaction to be assured, so far as experience can assure us, that the authority of established precedents is likely to be maintained.

General Rule, that the nature of the Contract determines the degree of Liability.

The leading maxims respecting liability upon *indefinite* obligations (using the term in the sense explained in the last paragraph) are, *first*, that an obligation under a simple contract debt is per-

Liability on different Contracts distinguished.
Simple Contract Debt.

(a) 6 Paton, 255. On the question of liability for the contracts of co-trustees in respect of homologation, see *Hamilton v. Gibb*, 16 May 1823, 2 S. 315, and *Graham v. Graham*, 15 June 1827, 5 S. 806. In the first case, one of several co-trustees, under a trust to sell for behoof of creditors, had, in order to get up the title-deeds—which were hypothecated for the grantor's business account—granted an obligation, bearing to be on behalf of himself and his co-trustees, to see the agent paid the just balance of his accounts. To a joint action for payment, the non-

subscribing trustee pleaded that he had given no authority to bind him, and had received no part of the price. He was held liable, in respect that he had signed the articles of roup and the disposition to the purchaser discharging the price, and that the deeds in question were necessary in order to sell the property. In the second case, where two trustees were held jointly liable upon an obligation to enter into a submission granted by one of them, the exact circumstances which were held to import homologation do not appear.

sonally binding upon the contracting trustee. *Secondly*, that an obligation in the nature of a personal security is personally binding on the obligant. *Thirdly*, that indirect personal obligations, constituted through the intervention of a party having authority to bind the trustee—*e.g.*, a partner or manager of a mercantile company in which the trust estate holds stock—are binding upon all the trustees who have sanctioned the investment, in like manner as in the case of direct obligations. *Fourthly*, that continuing contracts, as leases and feu contracts, are personally binding. *Fifthly*, that where the purpose of a contract is the conveyance of heritable property, or the creation of a real security, the adjection of a collateral personal obligation, granted by individual trustees under their designation of trustees, is equivalent only to a personal undertaking on the part of the subscribing trustees to make the trust estate forthcoming to the creditor to the extent of their powers; in other words, it is equivalent to warrandice from fact and deed. The rule of liability as to sales and assignations of personal property is not so well settled. *Sixthly*, with reference to the intersocial obligations arising under the contract of copartnership, the law, in so far as it may be held to depend on considerations peculiar to Scottish jurisprudence, rests for the present upon the judgment of Lord Kinloch in the case of the *Western Bank v. Buchanan (a)*, which is to the effect that trustees investing trust money in the stock of a joint stock company, and subscribing the contract under their designation as trustees, are not partners in their individual capacity, and are not liable beyond the amount of the investment in a question with copartners; but the tendency of the English authorities is to a different conclusion. *Seventhly*, trustees are personally liable to make reparation for their own wrongful acts, although arising in the course of the trust administration; but they are not personally responsible for the fault of their *employées*.

Personal Security.

Indirect Obligation.

Continuing Contracts.
Real Securities and Sale.

Partnership.

Negligence.

1. The doctrine, that trustees are liable personally to implement the contracts to which they become parties for the benefit of the estate, was established by Lord Eldon's judgment in *Higgins v. Livingstone (b)*. The principle was also applied in the judgment of

Trustees are personally liable upon their own Contracts.

(a) *Liquidators of Western Bank of Scotland v. Buchanan*, decided 12 Nov. 1861.

(b) *Higgins v. Livingstone*, 1 July 1816, 6 Pat. 244; *Hamilton v. Gibb*, 16 May 1823, 2 S. 315, stated above.

the House of Lords in *Jeffrey v. Brown* (a). The appellants, who were trustees on the sequestrated estate of a shipping firm, entered into an agreement with the respondents, who held a security over a ship, part of the bankrupt's estate, by which agreement the respondents agreed to give up all claims upon the vessel, on condition that they were paid the sum of L.2000, and were relieved of the engagements contracted by the agents of the bankrupt, affecting the said vessel. The appellants, having found that the claims against the vessel were greater than they were able to meet from the funds in their possession, resisted payment, and pleaded (b), that both from the mode in which the action was libelled, and from the nature of the office which they held, they could not be liable to any greater extent than that of the trust funds of which they were in possession, and were not bound to find funds in order to satisfy the claims of the respondents; and therefore, as they had no trust funds, the judgments of the Court below, finding them personally liable, were erroneous. The judgment of the Court of Session, finding the appellants personally liable to fulfil their contract, was affirmed, with costs (c).

Exceptional
Cases.

The only exceptions to, or limitations of, the rule of liability as for simple contract debts, are those which have been noticed in the outset; viz., that a trustee may expressly contract so as only to bind the estate; and that contracts entered into by individual trustees, although purporting to bind the entire body, are obligatory only on the subscribing trustees, unless authority were given by the others. The cases upon the liabilities of members of provisional committees illustrate the limitation last referred to. Those decisions have established the rule, that attendance at meetings does not bind the individual members of a committee for the contracts undertaken on

(a) *Jeffrey v. Brown*, 11 June 1824, 2 S. Ap. Ca. 349, affirming, but qualifying the judgment of the Court, 1 S. 108. See *Hay v. Cockburn's Trs.*, 19 July 1850, 12 D. 1298, & 8 D. 1011.

(b) 2 S. Ap. Ca. 355.

(c) 2 S. Ap. Ca. 356. The rule that trustees and executors are liable to fulfil their contracts with strangers to the trust, is now so well established

by native authority, that it is unnecessary to occupy space with explanatory notes on the English decisions. The following cases may, however, be referred to as among the most authoritative:—*Childs v. Morins*, 2 Bro. & Bing. 460; *Bradley v. Heath*, 3 Sim. 543, see 558, decided by Shadwell, V.-C.; *King v. Thorn*, 1 T. R. 489; *Appleton v. Kirks*, 5 East. 148.

behalf of the committee, and that in order to fix individual liability for specific contracts, the defender must be proved to have given authority (a).

2. The most apposite illustration of our second proposition, viz., that trustees are liable on obligations in the nature of personal securities, is to be found in the cases on liability upon bills of exchange. The doctrine here adverted to may either be viewed as a particular case of liability, as for contract debt; or it may be rested on the separate ground, that bills of exchange are in their own nature personal securities, and nothing else. A bill of exchange does not create a debt; on the contrary, the presumption of debt may be redargued by legal evidence of non-onerosity. The purpose of a bill is to create what may in popular language be termed a security; the nature of the security being, that the obligant surrenders his personal liberty, and submits to incarceration on a formal warrant obtained without the intervention of a decree, in the event of his being unable to meet the bill on the elapse of the appointed period of payment. In order that a trustee obliging himself under a personal obligation of this nature should be exempt from personal liability, it is necessary that the limitation of liability should be expressly declared.

Trustees are personally liable upon Bills and Personal Securities.

In contrasting the rule of the personal liability of trustees on bills of exchange with the doctrine laid down in *Campbell v. Gordon* (b), with reference to heritable securities, Lord Kinloch observed (c): "A bill of exchange is a document very peculiarly situated. It is a negotiable instrument, whose proper use is for the purposes of trade, and whose essential characteristics are punctual payment and summary enforcement. An inquiry into the extent of liability, considered as proportionate to the extent of funds possessed, is at variance with the essential character of the document. Here, the nature of the contract intervenes to determine the extent of the obligation." Accordingly, in all the cases that have occurred upon bills of exchange, the liability has been held to be personal. The decisions embrace questions involving the liability of exe-

Doctrine illustrated by Cases.

(a) *M'Ewan v. Campbell*, 19 Feb. 1857, 2 Macq. 499; *Bright v. Hutton*, 3 H. of L. Ca. 341; *Johnston v. Scott*, 18 Jan. 1860, 22 D. 393.

(b) *Campbell v. Gordon*, 13 June 1842, 1 Bell, 428, affg. 2 D. 428.

(c) In *Liquidators of Western Bank v. Buchanan*, 16 Nov. 1861.

cutors (a); trustees under family settlements (b); trustees for behoof of creditors (c); trustees of religious associations (d); and factors (e). The defence, that the trustees had no available funds, has been expressly overruled (f). The question, whether the trust estate is bound by the trustees' bill, depends, it would seem, upon the circumstance whether the trustees were acting within their powers and for the benefit of the estate (g).

Personal Bond.

On the analogy of the cases upon obligatory letters (h), we may conclude that a personal bond would also be personally binding on the subscribing trustees.

Liability of Trustees to the Public as Members of a Partnership or Joint Stock Company.

3. On the question, whether trustees investing trust money in trade or in the shares of joint stock companies are liable as partners to fulfil the engagements of the company, there is no direct authority in the law of Scotland; but there can be little doubt that the trustees are so liable, on the broad principle that liability as a partner is incurred by every party who holds himself out as a partner, irrespective of the nature of his interest in the partnership, and even though he has no interest in its concerns (i). An opinion to this effect is expressed in the concluding paragraph of the note to Lord Kinloch's judgment in the case of *The Western Bank v. Buchanan* (k); and the English authorities show that in the sister country trustees are held to incur liability to creditors of the partnership in the same measure as other individual partners (l).

(a) *Eaton Hammond & Sons v. Macgregor's Exors.*, 25 May 1837, 15 S. 1012.

(b) *Pattie v. Thomson*, 23 Dec. 1843, 6 D. 350; *Thomson v. M'Lachlan's Trs.*, 24 June 1829, 7 S. 787.

(c) *Murray v. Campbell*, 28 Nov. 1827, 6 S. 147; *Findlay, Bannatyne, & Co. v. Ord*, 10 July 1846, 8 D. 1089.

(d) *Ross v. Albion Joint Stock Co.*, 14 Jan. 1831, 9 S. 275.

(e) *Webster v. McCalman*, 3 June 1848, 10 D. 1133.

(f) *Eaton Hammond & Sons v. Macgregor*, *supra*.

(g) *Pattie v. Thomson*; *Findlay, Bannatyne, & Co. v. Ord*, *supra*.

(h) *Jeffrey v. Brown*, 11 June 1824,

2 S. Ap. Ca. 349, affg. 1 S. 103; *Graham v. Graham*, 15 June 1827, 5 S. 806. In the cases on cash-credit bonds, the obligation was expressed to be personal; see *Commercial Bank v. Sprot*, 27 May 1841, 3 D. 939; *Carswell v. Irvine*, 15 Jan. 1850, 12 D. 462. In practice it is understood that a personal bond would not be accepted from trustees, unless they bound themselves as individuals.

(i) See *Gordon v. Anderson*, 21 Jan. 1862, 24 D. 315, and cases cited in M.F. & Cl. on Issues, 502, in which issues were granted putting the question, whether the defender held himself out as a partner.

(k) 12 Nov. 1861.

(l) Trustees and executors trading

A trustee may incur indirect responsibility in various ways; as in the case of his empowering the factor to the trust, for instance, to enter into a particular contract (a); or, as in the case of a trust for payment of creditors, if he permits the bankrupt to carry on the business which is the subject of the trust, or accredits his transactions (b). Indirect Responsibility.

4. On the subject of continuing contracts other than that of partnership, the rule of liability is exemplified in the decisions, under which trustees adopting leases have been held liable to the proprietor for his rent (c). But in this class of cases also there is room for the defence of special contract; for the landlord may waive his claim, and allow the lease to be taken up without stipulating for the personal security of the trustee (d). On the other hand, should the trustee insist on remaining in possession, at the same time repudiating personal responsibility, he will be liable for the value of his occupancy of the subjects, if not in the name of rent, at all events in the equivalent form of damages (e). Liability of Trustees as Tenants,

With regard to liability for feu duties, it appears that infeftment is the test of the adoption of a feu; as it is only upon acceptance of the feudal estate that the vassal becomes bound to fulfil the prestations of the charter (f). Accordingly it has been ruled, that pending a dispute as to the validity of the bankrupt's title, the trustee may enter into possession without involving himself in personal liability (g). and Feuars.

5. The nature of the transaction being, in the absence of direct stipulation, the main element in the determination of all questions of personal liability, it seems to follow, that unless personal liability Liability of Trustees as Borrowers upon Heritable Security.

with trust funds under their collective designation, are held to be subject to the operation of the bankruptcy laws; and the creditors have no claim against other portions of the trust estate invested in the names of the beneficiaries (*Ex parte Garland*, 10 Ves. 110. See *ex parte Richardson*, 1 Buck, 202).

(a) *Thomas v. Walker's Trs.*, 4 July 1839, 7 S. 828, 4 Dec. 1832, 11 S. 162.

(b) *Murray v. Campbell*, 28 Nov. 1827, 6 S. 147.

(c) *Fairlie v. Neilson*, 18 Dec. 1821,

1 S. 222; and see Chapter XVI. (I. 314). *Contrà*, *Dundas v. Kirkaldy's Tr.*, 21 June 1853, 15 D. 753.

(d) See *M'Gregor v. Hunter*, 21 Nov. 1850, 13 D. 90.

(e) *Stead v. Cox*, 20 Jan. 1835, 13 S. 280; *Richardson v. Scott*, 24 June 1835, 13 S. 972.

(f) *Marquis of Abercorn v. Grieve*, 16 Dec. 1835, 18 S. 168; *Mitchell's Tr. v. Pearson*, *infra*.

(g) *Mitchell's Tr. v. Pearson*, 23 Jan. 1834, 12 S. 322.

*Gordon v.
Campbell.*

lity must be invariably presumed, the usual personal obligation in heritable securities is not obligatory upon the person of the individual trustee, except to the extent of obliging him to make the estate available. This exception to the general rule of liability was established upon sound principles by the concurring decisions of the Lord Ordinary and the Court, in *Gordon v. Campbell*, affirmed by the House of Lords on appeal (a). Mr Bell's trustees, of whom the respondent, Mr Campbell, was one, borrowed from the appellant, Colonel Gordon, a sum of L.7000 for the purposes of the trust estate. For this loan they gave the appellant a bond and disposition in security (b) over the trust estate, containing an obligation of repayment in the following terms: "Which sum of L.7000 sterling, we, as trustees aforesaid, bind and oblige ourselves, and the survivors or survivor of us, and such other person or persons as may be assumed by us, in virtue of the powers committed to us by the said trust deed, and by which trust deed it is declared, that when the trustees shall amount to or exceed three, a majority shall in all cases be a quorum, to content and repay to the said John Gordon, his heirs, assignees, or successors whomsoever, at the term of Whitsunday next." On this bond a personal charge for payment was given to one of the subscribing trustees. Lord Moncreiff, Ordinary, the judges of the Second Division, and Lords Brougham, Cottenham, and Campbell in the Court of Appeal, concurred in the opinion that the terms of the bond did not import a personal undertaking, but that of trustees only; and the charge was accordingly suspended.

*Opinion of
Lord Campbell.*

Lord Campbell observed, "It is clear there was only a limited liability, and not an absolute liability, *in solido*, for the whole of this advance. The party takes care to state that he contracts in his character of trustee, in words which I need not repeat (treating the trustees as a body, like a corporation), avoiding personal responsibility; and therefore I think he was not liable, and was entitled to the suspension" (c). We are aware that it has lately been suggested that this decision turned on the effect of the special destination introduced into the obligatory clause; but we do not discover

(a) *Gordon v. Campbell*, 13 June 1842, 1 Bell, 428, affg. 2 D. 639.

(b) It is called an "heritable bond" in Bell's report.

(c) 1 Bell, 457.

from the opinions of the law Lords that the judgment of the House proceeded on any other ground than that the parties contracted in their character "as trustees." But the decision has been universally regarded as an authoritative declaration of the doctrine of non-liability in all cases where trustees become bound in their collective character, under a contract of the nature of an heritable security; and we do not think that any claim inconsistent with this doctrine in its generality could now be successfully maintained.

It follows, by parity of reasoning, that trustees are not liable, in consequence of executing a conveyance of trust property for a valuable consideration, in personal warrandice. The purchaser must satisfy himself of the sufficiency of the title, and he is entitled to have the beneficiaries bound absolutely. If their security is inadequate, *sibi imputet* (a). It is not meant to be affirmed, however, that trustees bound simply would not be liable in personal warrandice; but merely, that in carrying the contract of sale into execution, the trustees are entitled to protect themselves by inserting a clause limiting their liability to warrandice from fact and deed.

Liability of
Trustees as
Vendors in
Warrandice.

It has never been expressly decided whether trustees assigning a personal right are bound to warrant the subsistence of the debt. We rather think that, in the absence of an express bargain to the contrary, they would. In sales of ships and other corporeal moveables, it is not usual to stipulate for express warrandice; but we incline to think that the trustees undertake by the sale an implied personal obligation to warrant the title.

Warrandice of
Assignments
and Sales of
Personal Pro-
perty.

6. The liability of trustees subscribing the contract of a joint stock company in their collective capacity, and registered under their designation, was confessedly an open question in Scotland when the case of *The Western Bank v. Buchanan* (b) was brought into Court. We have already stated the principle upon which we think that subscription to a contract of copartnery implies responsibility to the creditors of the company. But the import of the intersocial obligation constituted by subscription is liable to be modified by the terms of the actual contract between the partners. It cannot well be maintained that a contract whereby a body of shareholders

Liability of
Trustees to
Copartners,
and for Calls.

(a) See *Forbes' Trs. v. Mackintosh*,
15 June 1822, 1 S. 535; *Kelly v.*
Macindoe, 6 Mar. 1858, 20 D. 773.

(b) *Liquidators of Western Bank v.*
Buchanan, decided by Lord Kinloch,
12 Nov. 1861.

expressly undertake to liberate trustees from individual responsibility, and to accept the security of the trust estate, is an illegal compact. It is certainly not *societas leonina*; for the trustees give a substantial though a limited security. The practical question is, whether the shareholders, by contracting with the trustees in their fiduciary character, do thereby, in effect, agree to restrict the responsibility of the trustees to the value of the trust estate.

Unauthorized
Investments.

If trustees, *without authority*, or in breach of their duty, invest the funds of the trust estate in the shares of a mercantile company, it may be assumed that they will be personally liable to contribute as partners; and the trust estate will be exempt from liability (a).

Case of the
Bon Accord
Insurance Com-
pany.

In the case of the *Bon Accord Insurance Company* (b) it seems to have been assumed that the trustees were not personally liable, probably because they had not subscribed the company's contract. The only question raised in that case was as to the extent to which they were liable to make funds forthcoming. A part of the funds of the trust estate had been invested by the trustees on the security of a life interest in an entailed estate, the principal being secured by policies of assurance. In order to meet the calls upon the trust estate for the shares held in the *Bon Accord Company*, it was necessary to dispose of the heritable securities; and in doing so, a heavy loss was sustained. The Court held, that as a loan upon the security of a life interest was an improper investment of the trust funds, the trustees were liable to account to the *Bon Accord Company*, as creditors of the trust, for the full amount of the money so invested, and not merely for the amount realized by the sale of the security.

Buchanan v.
The Western
Bank.

The grounds of Lord Kinloch's judgment in the *Western Bank* case (c) were, that the contract of partnership does not, like the obligation undertaken on a bill of exchange, imply, *prima facie*, an intention on the part of the contracting party to become personally responsible for the fulfilment of his obligation; that the use of the collective designation, "as trustees," imports, in the ordinary acceptance of these words, confirmed by the rule established in

(a) *Dundee Ry. Co. v. Miller*, 31 Jan. 1832, 10 S. 269; *Malcolm v. West Lothian Ry. Co.*, 10 June 1835, 13 S. 887.

(b) *Bon Accord Ins. Co. v. Souter's Trs.*, 11 Dec. 1850, 13 D. 295.
(c) 12 Nov. 1861.

Gordon v. Campbell (a), an intention to bind the estate alone; and that by registering and advertising the trustees as partners under their collective designation, the company accepted them as partners in their representative capacity, and liberated them from personal responsibility. The case is under appeal to the First Division, and may possibly be carried further. The judgment in the case will therefore not be accepted by the profession as a final decision; though it will doubtless receive all the weight which is due to the opinion of the learned and eminent judge by whom it was pronounced. Apart from this decision, the question merits a careful consideration with reference to the general principles we have attempted to elucidate, and the doctrines of the English law, which, in a question of this nature, depending on principles of general jurisprudence, are entitled to the greatest consideration.

In the first place, it is clear that trustees cannot be liable for calls unless they have become partners of the company by making up a legal title to the shares. While the shares remain unconfirmed, or where, although confirmation has been expedited, the stock stands untransferred in the name of the testator or constituent of a body of trustees, the claim of the company is a debt against the executry estate, and the obligation of the executor is to make the estate forthcoming to the creditors (b). He can only incur personal liability by denuding of the surplus estate before satisfying the claims upon it. In the event of a claim emerging *after* the surplus funds have been transferred to the beneficiaries, it is thought that a claim would lie against the latter to the extent to which they had derived benefit from the trust estate (c).

Trustees are not liable unless they have completed a Title to the Shares by transfer and registration.

(a) 1 Bell, 428.

(b) *Sturrock v. Thom's Exrs.*, 13 D. 762. The provisions of the Joint Stock Companies Act upon this point seem to be declaratory of the common law. Trustees are not bound to take up a partnership (*Downs v. Collins*, 6 Hare, 418); and if they abstain from taking up the partnership interest, the estate of the deceased will be liable under the Act to the same extent to which the deceased would have been had he lived, and the executor will be liable only for a *due administration*

(19 & 20 Vict. cap. 47, § 65; *Armstrong's case*, 1 De G. & Sm. 565; *Blakeley's case*, 18 Beav. 193, and on appeal, 3 M'N. & G. 726; *Gowthwaite's case*, 3 M'N. & G. 187; *Crossfield's case*, 2 De G. & Sm. 388, and 2 De G. M'N. & G. 128; and cases of *Drummond and Northumberland, etc., Bank*, *infra*). See also case of *Bon Accord Ins. Co.*, *supra*, p. 16.

(c) In *ex parte Luard*, re the *Northumberland and Durham District Bank*, 29 L. J. Ch. 269, it was decided by the Lords Justices that where stock

How Liability
may be
avoided.

The practical conclusion to be drawn from these considerations is, that trustees who wish to avoid personal liability as contributories ought not to make up a title to shares standing in the name of their constituent, but should have the shares transferred direct from the *hereditas* of the truster into the name of the purchaser, the transfer being, if necessary, expressed to be by their authority or with their consent (a).

Trustees who
become Part-
ners undertake
a personal
liability, un-
less an express
stipulation is
made to the
contrary.

After trustees have become partners of a mercantile company by being entered as such in a register of shareholders, or by having accepted a deed of transfer, the presumption clearly is that they

had been transferred into the name of a married woman, to her separate use, the husband, and not merely the wife's separate estate, was liable to be placed on the list of contributories.

(a) In the case of the *Northumberland and Durham Bank ex parte Dixon's Exrs.*, 1 Dr. & Sm. 225, executors who had received dividends, but whose names had not been entered on the list of shareholders, were held liable to be put on the list of contributories, but only *qua* executors, and for the purpose of operating by calls on the trust estate. In *ex parte Drummond*, 2 Giff. 189, it appeared that trustees under a Scotch trust disposition and settlement were entitled to certain shares in the Royal Bank of Australia; but the deed was not acted on for some years. The truster's eldest son took out administration to the personal estate in England, including the shares in question; and on the company being wound up, his name was placed on the list of contributories. Afterwards the trust deed was set up by a decree of the Court of Session; and the Court of Appeal in Chancery ordered the names of the trustees to be substituted in the list of contributories for that of the son. It appears that in this case the trustees had not been entered on the register of shareholders, and there was no question of per-

sonal, but merely of representative liability under the 65th section.

The case of *Finlay, Hodgson, & Co. in re The Mexican & South American Mining Co.*, 27 L. J. Ch. 664, 14 Jur. N. S. 1090, illustrates the doctrine that liability attaches rather in respect of title than of interest. A London banking firm held 1453 scrip shares in the company, whereof 60 in their own right and 1395 for other persons. There was evidence that the directors knew that the bank were trustees to some extent, but were not aware of the particulars. There was no register of shareholders and no deed of settlement. Sir John Romilly held that the bankers were to be put upon the list of contributories for their own shares, but not for those of their constituents. Here there was no question of liability *qua* trustees. The relation between the bankers and their constituents was a *simple resulting trust*; and the constituents were liable. In another branch of the same case it was determined that where there was no deed of settlement or register, the test of liability in the case of a partner holding scrip shares in his *own* name, was the possession of the scrip (*ex parte Barclay*, 27 L. J. Ch. 660). *Finlay's* case, therefore, amounts to this, that where liability results from a mere possession, the Court will inquire whether the possession was beneficial.

become bound in the same manner as other partners, and subject to a like liability (a). Liability may of course be limited by a special contract; that is, by a clause in the company's settlement expressly limiting the liability of trustees and executors, or by a special contract between the individual trustee on the one part, and the company, or those having authority to bind it in matters of this description, on the other.

It is very doubtful whether the completion of a transfer of stock into the names of certain trustees under their collective designation by authority of the directors of a company would be binding upon the company, even supposing that the use of the collective designation naturally imported a limitation of liability,—which does not seem to be its effect, except in the case of contracts relating to heritable property. It is to be observed, that although the directors of a joint stock company may have authority to bind the partners in such transactions with third parties as are within the scope of the company's business, it by no means follows that they have authority to limit the liability of purchasers of shares by inserting a special stipulation to that effect in the register of transfers (b).

Effect of Registration under their collective designation.

In the absence of any special stipulation in the company's deed of settlement limiting the liability of executors in respect of the intersocial obligation, it appears that no doubt has ever been entertained in England of the liability of a trustee or executor to be placed upon the list of contributories (c). The principle that an

Doctrine of the Law of England.

(a) The registered owner of shares may create a trust of the personal right to them by depositing the shares with a trustee in security, or for a special purpose. A transaction of this nature does not make the trustee liable as a contributor; for the trustee has only a *jus ad rem*, and not a property title to the shares, and is therefore not a partner (*Hall's case*, 1 M'N. & G. 307). We assume of course that the transaction is not collusive; that there is a *reversionary* interest remaining in the truster.

(b) *Davidson's case*, 9 De G. & Sm. 21; *Daniel's case*, 28 Beav. 568; *Nicholl's case*, 24 Beav. 639; *Davidson's case*, 4 Kay and Johns. 688.

(c) *Spence's case*, 17 Beav. 203;

Hall's case, 1 M'N. & G. 307. In decisions under the Joint Stock Companies Act of 1848, of which the above are instances, it appears that the placing of a party on the list of contributories was considered by the judges as a decision affecting his liability to copartners. A party who was liable to the public as a reputed partner, but who was not liable in a question with other partners, would not have been placed upon the list (*North of England Bank, ex parte Armstrong*, 1 De G. & Sm. 570; *Angas case*, 1 De G. & Sm. 563). The principle upon which the liability to be placed as a contributory depends, under the 95-7th sections of the Act of 1856, is precisely similar. (Per Lord J. Turner in *Luard's case*,

executor, on becoming a partner, is responsible as such without limitation, was impliedly decided by Lord Eldon in *ex parte Garland* (a). Although the question there was with creditors of the trust, yet the principle was clearly laid down that the trust estate was not liable, as it must have been had the trustees not been partners (b). The principle of this decision has been repeatedly affirmed in questions with creditors (c); and it is immaterial whether the trading was or was not authorized by the terms of the trust (d), whether the creditors had or had not notice that they were carrying on a trade as trustees for others (e), and whether they had or had not trust funds in their possession (f).

When the Trust Estate is liable to contribute.

In other cases, it has been held that the general estate of a trustor was not liable for loss sustained in consequence of a portion of the estate having been invested in business; on the principle that the engaging in trade was the trustee's individual act. It has been held that a testator may sever a part of his funds from the general estate, and authorize his trustees to invest it in business; and that such part of it will alone be liable for the obligations of the company (g). A somewhat dangerous doctrine; since, by a slight extension of it, a purchaser might transfer his mining or bank stock into the names of trustees, by a deed *inter vivos*, and in so doing be held to limit his liability to the value of the stock.

Liability of Trustees for Fraud or Negligence.

7. It is scarcely necessary to prove by a formal citation of authorities that trustees are directly and personally liable to make reparation for injuries caused by their own fraud or negligence. It is to be observed, that in this class of cases the injured party has no recourse against the trust estate, since the trustees are *ex hypothesi* not acting under the protection of their powers; for of course a

29 L. J. Ch. 271; and see the cases of *Drummond and Dixon's Exrs.*, noticed *supra*, p. 18, note (a).

(a) *Ex parte Garland*, 10 Ves. 100.

(b) 10 Ves. 118.

(c) See *Blakeley's Exrs.*, 13 Beav. 138, per Lord Langdale, and see 3 M'N. & G. 731; *ex parte Gouthwaite*, 3 M'N. & G. 199.

(d) *Lucas v. Beach*, 1 M. & G. 417.

(e) See *Dunns v. Collins*, 6 Hare, 418; *Labouchere v. Tucker*, 11 Moore's P. C. Ca. 198.

(f) *Newry Enniskillen Ry. Co. v. Moss*, 12 Beav. 64; *Phin v. Gillom*, 6 Hare, 1.

(g) See *Williams' Exr.* 1527; *Garland*, *ut supra*; *ex parte Richardson*, 1 Buck, 202.

trust can never, on any sound principle of construction, be held to give the trustees a license to commit injury or injustice. "It is quite obvious," observed Lord Cottenham in a leading case, "that it would be a direct violation in all cases of the purpose of the creator of any gift, or benefit, or charity, to provide out of the charity fund for the payment of damages from the improper acts of those who have the management of the fund. . . . The author of the gift, the creator of the charity, intended that the officers of the charity should have the fund confided to them, and he looked only to the trustees for the proper management and performance of the purposes of the trust. Whereas to give damages out of the fund would not be a purpose which the founder had in view, but would be a direct violation of the purpose for which the fund was intended" (a). These observations were made in deciding an action in which damages were claimed against trustees in their fiduciary capacity, on the ground that they had refused to admit the pursuer to the benefit of the charity. The law lords were unanimously of opinion that the claim was untenable.

Damages cannot be claimed from the Trust Estate.

On the question of personal liability we shall refer to two cases, in one of which the action was laid upon legal fraud; in the other, upon negligence.

Personal Liability.

The case of *Allan v. Kerr's Trustees* (b) was an action for reduction of a sale by trustees of stock in a banking company on the ground of fraudulent misrepresentation. The Court were of opinion that no relevant case had been made out against the trustees; that the alleged misrepresentations were those of the company; and that the trustees had no more knowledge of the company's affairs than any private shareholder, and were not responsible for its reports. But it was assumed by all the judges, that if the trustees had uttered any false representation as an inducement to the pursuers to make the purchase, they would have been liable personally, like any private shareholder, to make reparation.

Allan v. Kerr's Trustees.

(a) *Heriot's Hospital v. Ross*, 19 Mar. 1846, 5 Bell, 37. See p. 46, and Lord Campbell's opinion, p. 56, and *Duncan v. Findlater*, there referred to.

(b) *Allan v. Kerr's Trs.*, 7 June 1853, 15 D. 725. In the more recent

proceedings arising out of the insolvency of the Aberdeen and Western Banks, the trustees who were called as defenders were merely sued in their representative capacity, with the view of obtaining reparation for the fault of their respective constituents.

Liability for
the acts of
Employees.

The other case alluded to (a) raised the question of the liability of trustees for the acts of their employees. Mr Kinloch of Kinloch, as one of the trustees on the estate of Cronan, had let certain farms to the pursuer by lease, under which the proprietors were bound to make and maintain certain embankments for the purpose of protecting the estate against flooding. In consequence, as alleged, of operations upon the embankment, a portion of the property was flooded; and the tenant raised an action against Mr Kinloch, as an individual, claiming damages on the ground that the injury had been caused by the operations upon the embankment performed under his directions. His defence was, that as the pursuer concluded against him only as a private individual, no action could lie against him without an averment that he had acted nimiously and recklessly (b). The Court were unanimously of opinion that the pursuer would be personally liable for a breach of his obligation. On the principle of this case, it may safely be affirmed that private trustees carrying on a business attended with hazard would be personally liable to make reparation for any injury that might be sustained through the negligence of their subordinates, on the same grounds, and subject of course to the same limitations, as those by which the liability of private individuals is regulated. But any sum paid as damages resulting from the fault of employees, assuming that the trustees had done their duty in the selection of competent persons, would be chargeable against the trust estate in a question between the trustee and beneficiary.

Liability of
Public Trus-
tees for the
acts of Em-
ployees.

The liability of public trustees acting under statutory authority was settled by the decisions of the House of Lords in *Duncan v. Findlater* and *The Ministers of Edinburgh v. The Magistrates*. In the first of these cases, it was decided that no claim lay against the funds of a road trust in respect of an injury sustained by a private individual using the road (c). In the second case (d), it was ruled that the magistrates and Town Council were not liable in their cor-

(a) *Hill v. Kinloch*, 1 Mar. 1856, 18 D. 722.

(b) *Irvine v. Tait*, 3 June 1808, M. Death-bed, No. 1.

(c) *Duncan v. Findlater*, 23 Aug. 1839, M'L. & Rob. 911, reversing 16 S. 1150; *New Clyde Shipping Co. v.*

River Clyde Trs., 16 July 1842, 4 D. 1521.

(d) *Min. of Edinburgh v. The Mags. of Edinburgh*, 27 July 1849, 6 Bell, 509. And see *Pearson v. Mags. of Montrose*, 1669, M. 13098; *Innes v. Mags. of Edinburgh*, 1798, M. 13189.

porate capacity to make reparation for the loss sustained by the ministers of the city who were entitled to the proceeds of an assessment, in consequence of the magistrates having neglected to perform the duty of collecting the assessment in terms of their statutory powers. An opinion, however, was intimated, that the members of the corporation were responsible for the consequences of their personal negligence (a); and an opinion to a similar purport was intimated by Lord Cottenham in *Findlater's* case, subject to the observation, that while the trustees kept within their powers, they would not be liable for any damage which their acts might occasion to other persons (b). It would seem, therefore, that in the case of an injury resulting from the fault of employees of the trustees, unless the injured party can substantiate a claim against the surveyor or other person employed by the trustees, he will have no redress (c).

The judgment of the House of Lords in *Ross v. Heriot's Hospital* (d) decided an important point of practice with reference to personal actions, viz., that it is incompetent to pronounce decree against trustees personally under a summons the conclusions of which are directed against them in their fiduciary character. The conclusions of the summons were, that "in respect the pursuer has, in consequence of the repeated refusals of his said applications to be admitted to the benefit of the said institution, as before mentioned, suffered great hardship, loss, and damage, and his prospects in life have been seriously injured, the feoffees of trust and governors foresaid, defenders, ought and should be decerned and ordained, by decree of the said lords, to make payment to the pursuer of the sum of L.500 sterling." Lord Cottenham observed, that though the pursuer did not expressly pray that the damages might be paid out of the trust fund, the summons was so constituted that he could not

Incompetent to award a personal decerniture against Trustees if the action only conclude against the body collectively.

(a) Per Lord Campbell, 6 Bell, 537.

(b) M'L. & Rob. 930; and see *British Plate Manufacturers v. Meredith*, 4 T. R. 794; *Bolton v. Crowther*, 4 Dow. & Ry. 195.

(c) A different rule has been laid down respecting the liability of magistrates in their corporate capacity.

Corporations, it seems, are regarded not as trustees for the public, but as individual persons responsible for the consequence of their malfeasance (*Dargie v. Mags. of Forfar*, 10 Mar. 1855, 17 D. 730; *Innes v. Mags. of Edinburgh*, 1798, M. 13189).

(d) *Ross v. Heriot's Hospital*, 19 Mar. 1846, 5 Bell, 37.

get any damages except out of the trust fund ; and he was clearly of opinion that a personal decerniture was out of the question (a). Lord Brougham's opinion is equally explicit (b). Where, therefore, the object of a pursuer is to claim damages against a trustee personally for breach of trust, it is better that he should not be designed as trustee in the formal part of the summons. It is sufficient that the nature of the fiduciary relation should be set forth in the condescendence, along with the facts constituting the alleged breach of trust.

(a) 5 Bell, 46.

(b) 5 Bell, 51.

CHAPTER XXIV.

OF THE LIABILITIES INCURRED BY TRUSTEES TO THEIR CONSTITUENTS.

THE subject of the present chapter has been to a large extent anticipated in treating of the duties and powers of trustees. As a general rule, the abuse of a power, or the omission to perform a duty, carries with it a commensurate liability to the beneficiary who has been injured by the breach of trust. The line of the trustee's duty, in the exercise of the various functions which devolve upon him, is marked out by the records of decided cases, in which the sanction of personal liability has been attached to divergence from that line. It would not have been possible to convey to the reader any adequate view of the obligations incumbent upon trustees, and the diligence which the law exacts from persons holding the office, without going into a detailed examination of the cases in which the nature of the duties incumbent upon the trustee has been determined by the application of that most rigorous of tests, the test of personal responsibility.

Limits of the subject.

Upon the subject of liability to the trustee's constituents in its general relations, and with reference to the acts of the individual trustee, our observations are therefore necessarily brief; being, in fact, little more than a summary of the results of previous chapters, but regarded from a different stand-point—the interests of the trustee being at present the object in view, as were those of the beneficiary in the chapters on duties and powers.

(1) General relations of subject.

There remain behind the special topics of the liability of trustees and factors for interest on unproductive capital; the question of joint or individual responsibility in relation to the intrusions of co-trustees; and the doctrine of constructive liability for the intrusions of factors; including in the last two divisions the

(2) Liability for Interest.
(3) Liability for Co-trustees;
(4) for Factors.

subject of the construction and effect of indemnity clauses. The subjects last mentioned, are obviously susceptible of discussion in their more general relations; the grounds of constructive responsibility for the acts of other persons being obviously independent, in a great degree, of the specific character of the duties omitted or acts performed by the defaulting administrator. These topics we shall accordingly discuss at greater length, and without reference to what has been said in previous chapters.

SECTION I.

LIABILITY OF TRUSTEES FOR NEGLIGENCE.

Diligence
prestable from
Trustees.

In the determination of questions of liability, even as between trustee and beneficiary, very little aid is to be derived from general maxims. It has frequently been asserted—and we are not aware that the principle has ever been directly controverted—that the responsibility of gratuitous trustees under the law of Scotland was inferior to the degree of diligence prestable from mandatories according to the principles of the civil law (*a*); but it is impossible to peruse the numerous decisions in which personal responsibility has been enforced against gratuitous trustees, under circumstances of hardship, without perceiving that the old partitions which separated the several degrees of culpa have been refined away to such an extent, that the distinctions have no longer any practical bearing upon the actual questions which occur in regard to the administration of trusts. The doctrine of the limited responsibility of trustees, if it exists at all, holds good only in questions of liability for acts in which the trustee himself has not personally participated.

Uncertainty
of the Law
as to strict
diligence.

It is to be regretted that no effort has been made to lay down a distinct criterion of liability in regard to the responsibility of the trustee for negligence. If the rule of liability actually in operation is, as it seems to be, that of *strict* diligence, it were better for all parties that it should be authoritatively laid down and inflexibly applied. The trustee would then be put upon his guard; and if he

(*a*) Ersk. 3, 8, 36; Bell's Com. 849. the civil law, in exact diligence; Cod. Mandatories were liable, according to Lib. 4, Tit. 35, L. 13.

did find himself involved in personal responsibilities in consequence of negligence, he would at least be spared the annoyance of a costly litigation, ending, as personal actions against trustees usually do end, in an award of damages, enhanced by a not inconsiderable accession to the debt, in the shape of a decree for expenses.

We proceed to recapitulate, in the briefest possible compass, the various acts of omission and intromission which may involve the trustee in personal liability.

Trustees are personally liable for neglecting to get in debts due to the estate (a); or for discharging a security, or consenting to the liberation of a debtor (b); but they are allowed a reasonable time to realize (c). The fact that the trustee was interested as a beneficiary, and had no other object but to give time to the debtor to extricate his affairs, is not a sufficient defence.

Liability for neglecting to realize.

Trustees are liable to the beneficiary for loss sustained in consequence of having invested the funds committed to their care in a manner not sanctioned by the settlement. This includes several cases.

Liability for Loss arising from investment in trade;

(1.) If the trustee invest his constituent's money in a mercantile business in which he is partner, he is liable to account for a proportion of the profits of the business corresponding to the amount invested; and if loss is sustained, or no profits earned, he must account for the money invested, increased by the addition of accumulated interest (d). The same liability attaches if the trustee leaves the money in the business where it was invested, without having special

(a) *Moffat v. Robertson*, 31 Jan. 1834, 12 S. 369; *Forman v. Burns*, 2 Feb. 1853, 15 D. 362; *Gourlay v. Dumbreck*, 1710, M. 16192; *Heggie v. Heggie*, 18 Mar. 1858, 20 D. 823.

(b) *Abercrombie v. Innes*, 1723, Rob. Ap. Ca. 467.

(c) See *Baird's case*, 20 D. 1176.

(d) *Laird v. Laird*, 26 June 1855, 17 D. 984; *Cochrane v. Black*, 1 Feb. 1855, 17 D. 321; *Graham v. Keble*, 10 Nov. 1813, 2 Dow, 17. An authority to invest upon "personal security" will not justify trustees to lend the money to a person in trade, as was observed by Sir William Grant, in a case where trustees had lent to the husband of a beneficiary. "The authority," he

observed, "did not extend to an accommodation: it was evident the trustees had, upon the marriage, been induced to accommodate the husband with the sum, which they had no power to do" (*Langston v. Ollivant*, 9 Coop. 33). And where trustees were directed by the settlement to lend a wife's money to the husband on her requisition, it was held that his insolvency justified the trustees in refusing to comply with the request (*Boss v. Godsall*, 1 Y. & C. Ch. Ca. 617). Lord Eldon would not even allow a trustee to invest in the stock of the Bank of England (*Howe v. E. of Dartmouth*, 7 Ves. 150). On the subject of liability for interest, see the ensuing Chapter.

authority from the trustor to do so (a). (2.) If the trustee invest the trust money in a business in which he is not interested, or in the stock of an incorporated company; or if, without authority, he leave the money so invested as he found it, beyond the period which may be fixed as being reasonably sufficient for winding up the affairs of the trust, he will (according to the general opinion of the profession, and on the principles laid down in the cases of *Laird* and *Cochrane*, and the cases on heritable securities) be liable to replace the money with interest, and to relieve the beneficiaries of any liabilities that may have been incurred to the creditors of the company (b).

or on hazardous security.

(3.) A trustee ought not to invest on foreign securities (c).

(4.) Trustees investing on personal security (d), bills (e), or personal bonds (f), are liable to replace the money with interest, or to pay such a sum as the beneficiary would have reaped if the fund had

(a) *Guthrie v. Fairweather*, 1 Dec. 1853, 16 D. 214; *Laird v. Laird*, *supra*.

(b) See *Accountant of Court v. Baird*, 29 June 1858, 20 D. 1176; *Hughes v. Empson*, 22 Beav. 181; *Buxton v. Buxton*, 1 M. & C. 80; and *Orr v. Newton*, 2 Cox, 276, as to the question of reasonable delay for the purpose of realization. There is no doubt that an English trustee also must account for profits if required (*Tebbs v. Carpenter*, 1 Mad. 304). The rule established by the Court of Chancery on this subject is, that the beneficiary has the option of taking the actual profits, or charging the executor with interest (*Robinson v. Robinson*, 1 De G. M'N. & G. 257; *Ex parte Watson*, 2 V. & B. 414; *Docker v. Somes*, 2 M. & K. 655; *Heathcote v. Hulme*, 1 J. & W. 122; *Ratcliffe v. Graves*, 2 Ch. Ca. 152). A loan to an executor who is engaged in trade is regarded as an investment in trade, and liability for profits attaches accordingly (*Townend v. Townend*, 1 Giff. 201). The same construction is put upon the transaction if an executor who is in trade pay the trust funds into his private bank account (*Treves v. Townshend*, 1 B. C. C. 284, and

cases cited by Lewin, 4th Ed. p. 254).

(c) See *Blackett v. Gilchrist*, 30 May 1832, 10 S. 590; *Ferguson v. Menzies*, 21 May 1830, 8 S. 782; *Simpson v. Doud*, 1 Feb. 1855, 17 D. 315; *Acc. of Court v. Geddes*, 29 June 1858, 20 D. 1174. "Foreign Securities," when mentioned as a subject of investment in a power, may be held to include such securities as would be authorized by the courts of the country which the testator may be supposed to have had in view, and will therefore include the Government stock of the state in view, but not the bonds of mercantile or local corporations (*Ellis v. Eden*, 23 Beav. 543). Foreign loans, guaranteed by the British Government, have been held not to fall within the description of Government funds in which trustees may legally invest (*Burnie v. Getting*, 2 Coll. 324).

(d) *Anderson v. Small*, 12 Feb. 1833, 11 S. 382; *Watson v. Crawcour*, 9 June 1843, 5 D. 1182.

(e) *Blain v. Paterson*, 28 Jan. 1836, 14 S. 361; *Ross v. Allan's Tr.*, 13 Mar. 1850, 13 D. 44.

(f) *Moffat v. Robertson*, 31 Jan. 1834, 12 S. 369.

been invested on good heritable security, and the interest accumulated (a). (5.) The same result will follow an investment on insufficient heritable security, such as postponed bonds with an insufficient margin, or bonds of annuity (b). (6.) Trustees refusing to invest in the funds or other investment sanctioned by the trust deed, upon the requisition of the parties beneficially interested, will be held liable in damages equal to the rise in the value of stock in the interval (c).

Trustees are not liable for the loss of the trust estate by robbery (d), fire (e), or other casualty; and it would seem that a trustee is not liable as for negligence in not insuring against casualties. Money deposited in bank until a suitable investment is found, lies at the risk of the beneficiary, unless the bank was in bad credit, and the trustees were guilty of negligence in not withdrawing the deposit before the failure (f).

Responsibility
for Loss by
Fraud or
Casualty.

A different criterion of liability must be applied in judging of the conduct of trustees acting in pursuance of a power to embark the trust money in speculative transactions; as, for example, to carry on a lease or a going business. In such cases, the main duty of the trustee is not that of immediate realization; and as the interests of the business might be injured by the adoption of very rigorous

Responsibility
for Assets
where Trustees
empowered
to continue
hazardous or
speculative
investments;

(a) See, in addition to the foregoing cases, *Morrison v. Miller*, 9 Feb. 1827, 5 S. 322; *Sym v. Charles*, 13 May 1830, 8 S. 743; *Pollexfen v. Stewart*, 14 July 1841, 3 D. 1215; *Wellwood v. Ross*, 23 June 1831, 9 S. 790; *Gray v. Gray*, 4 June 1835, 13 S. 866.

(b) *Acc. of Court v. Forsyth*, 28 Jan. 1853, 15 D. 345; *Murray v. Murray*, 30 May 1833, 11 S. 663; but see *Graham v. Hunter's Trs.*, 4 Mar. 1831, 9 S. 543; *Thomson v. Christie*, 1 Macq. 238; *Train v. Bell's Trs.*, 26 May 1824, 3 S. 68; *Bon Accord Ins. Co. v. Souter's Trs.*, 11 Dec. 1850, 13 D. 295. In *Raby v. Ridehalgh*, 7 De G. M'N. & G. 108, trustees were found liable for loss arising through an investment upon insufficient real security, which they had made at the request of a liferenter, with the object of increasing the immediate return. The Court gave no opinion whether an invest-

ment on mortgage was a legal investment according to the law of England. It has been held that trustees empowered to invest on mortgage may not lend to one of themselves, as all must exercise an impartial judgment as to the sufficiency of the security (*Stickney v. Sewell*, 1 M. & Cr. 8). Where the funds are lent on a subsisting mortgage, inquiry ought to be made as to the sufficiency of the security. See *Lewin, Tr.*, 4th Ed. 242.

(c) *Morrison v. Miller*, 9 Feb. 1827, 5 S. 322; *Sym v. Charles*, 13 May 1830, 8 S. 743.

(d) *Morley v. Morley*, 2 Ch. Ca. 2; *Jones v. Lewis*, 2 Vesey, 240.

(e) *Bailey v. Gould*, 4 Y. & C. 221, 9 L. J. Exch. Eq. 43.

(f) *Pearson v. Grierson*, 19 Nov. 1825, 4 S. 205; *Gibb v. Gibb*, 1769, M. 16363; *Johnston v. Newton*, 11 Hare, 169, 22 L. J. Ch. 1039.

measures against debtors, it has been held that the duty of the trustee in regard to the ingathering of debts is not the same as that of an executor, but is that which might be expected from a prudent man of business in the management of his own affairs (a). The distinction to which we point is reflected in the law of evidence applicable to actions founded upon breach of duty. In actions against trustees in their character as executors, it lies upon them to show a reason for neglecting to use diligence. In the case of trustees carrying on a business, the onus of proving negligence lies on the pursuer (b).

where Trustees are authorized to invest on personal security.

Trustees authorized to invest upon personal security are clearly warranted in investing in the stock of incorporated mercantile companies (c); but they are not entitled to *lend* the trust funds, even to a beneficiary upon his own bill or acknowledgment (d). An authority to invest on personal security, fortified by a clause of indemnity, was held sufficient to protect trustees from liability for loss arising from an investment on a postponed heritable bond, with a collateral personal security in the shape of an assignment of a policy of life assurance (e).

Liability in respect of erroneous payments.

As trustees are responsible for their intromissions, and bound to account to the party having the beneficial interest, they will be liable to replace money which they have inadvertently, or from error in fact or law, paid to one not entitled to receive it (f), or whose interest was postponed to a preferable claimant (g). The grounds on which they may claim to be exempt from the liability to make reparation are—that the payment was made to a party who was in

Grounds of exemption from Liability.

(a) See *Edmond v. Dingwall's Trs.*, 16 Nov. 1860, 23 D. 21; *Gill v. Earl of Fife's Trs.*, 8 July 1823, 2 S. 460; *Kay v. Miln*, 4 Feb. 1890, 8 S. 437.

(b) *Cameron v. Anderson*, 12 Nov. 1844, 7 D. 92; *Miller's Trs. v. Miller*, 23 Feb. 1848, 10 D. 765; *Dundas v. Morrison*, 4 Dec. 1857, 20 D. 228.

(c) Per Lord Moncreiff in *Seton v. Dawson*, 18 Dec. 1841, 4 D. 328.

(d) *Ross v. Allan's Trs.*, 13 Nov. 1850, 13 D. 44; *Langston v. Ollivant*, G. Coop. 33; *Ross v. Godsall*, 1 Y. & C. Ch. Ca. 617.

(e) *Graham v. Hunter's Trs.*, 4 May

1831, 9 S. 543. See, however, *Bon Accord Ins. Co. v. Souter's Trs.*, *supra*.

(f) *Mag. of Airdrie v. Smith*, 18 July 1850, 12 D. 1222; *Mayne v. M'Keand*, 4 June 1835, 13 S. 870; *Freen v. Beveridge*, 28 June 1832, 10 S. 727; *Gregory v. Anderson*, Robertson, Ap. Ca. 178; *Osburn v. Osburn*, M. 16195.

(g) *Cruikshank's Trs. v. Cruikshank*, 24 Apr. 1845, 4 Bell, 179; *Mackenzie v. Thomson*, 12 Nov. 1846, 9 D. 35; *Fraser v. Fraser*, 8 Dec. 1826, 5 S. 104; but see *Jeffrey v. Ure*, 21 June 1825, 1 W. & S. 565.

possession of a legal title at the time, *e.g.*, by service or confirmation as heir of the destination, though it has afterwards been proved that he was not the heir; or secondly, that the mistake arose in consequence of the fault of the beneficiary himself in not claiming the bequest prior to the period of distribution, he being *sui juris* and cognizant of the settlement; or thirdly, that the claim is barred by long delay and acquiescence, whereby the trustee has been deprived of the means of obtaining relief from the party to whom the payment was erroneously made (a).

To the same category of liability we may refer the rule according to which executors of an insolvent estate paying before the elapse of six months from the testator's death, or paying a creditor in full after the elapse of that period, when there is a deficiency of funds, are liable to other creditors for a dividend equal to that which the estate would have afforded had the distribution been made upon an equitable footing (b). The discharge of a married woman *stante matrimonio* does not protect the trustees from liability for having paid to the husband without authority (c).

Liability of
Executors
paying before
six months,
etc.

Where trustees exceed their powers, as for example by selling the trust estate without a power of sale (d), or by incurring expense in parliamentary proceedings (e), they have no claim against the beneficiary for the expense incurred in the execution of such acts. On the other hand, trustees would seem not to be liable for the non-exercise of a discretionary power, *e.g.*, for neglecting to demand security for the payment of marriage provisions (f). In the case of a sale without authority being afterwards set aside at the instance of the beneficiary, they would be liable in damages to the purchaser without relief (g). In fine, any manifest breach of duty, whether in the nature of a failure in performance or of an excess in the execution of powers, whereby the interests of the

Liability of
Trustees for
exceeding their
powers.

(a) See the subject treated *infra*, Chap. XXIX. (Beneficiary's Right of Action).

(b) *Supra*, pp. 352, 416.

(c) *Mayne v. M'Keand*, *supra*; see *Ross v. Allan's Trs.*, 13 Nov. 1850, 13 D. 44.

(d) *Clelland v. Brodie*, 20 Nov. 1844, 7 D. 147; *Fleming v. Campbell*, 25 June 1845, 7 D. 935. See the sub-

ject of Powers treated in Chapters XXI. and XXII.

(e) *Myles*, 13 Dec. 1855, 18 D. 205; *Mackintosh's Trs. v. Mackintosh*, 30 June 1852, 14 D. 928; *Brown v. Adam*, 19 Feb. 1848, 10 D. 744.

(f) *Stark v. Moncreiff*, 7 June 1838, 16 S. 1114.

(g) *Mag. of Airdrie v. Smith*, 13 July 1850, 12 D. 1222.

trustee's constituents are injured, will, in accordance with the doctrines of reparation, involve the trustee in personal liability (a).

SECTION II.

LIABILITY OF TRUSTEES FOR INTEREST ON UNPRODUCTIVE CAPITAL (b).

General Rule stated.

On the principle that every liquid debt, payment of which is unduly withheld, carries interest from the legal term of payment, it follows that trustees chargeable with any unreasonable delay in

(a) See *Morrison v. Miller*, 9 Feb. 1827, 5 S. 322.

(b) The following note of a few of the leading English cases will suffice to show that the law of England, in reference to the subject of this section, is substantially identical with that administered by our own Courts:—

1. The rate of interest usually charged, where the conduct of the trustee is not censurable or open to suspicion, is 4 per cent., or such higher rate of interest or profits as the trustee may have actually obtained (*Lewin, Tr.*, 4th Ed. 254). In *Attorney-General v. Alford*, Lord Cranworth disapproved of charging a trustee with penal interest; and laid down the rule, that the interest to be charged against the trustee was that which he *had* or *was presumed* to have received, or which he *ought* to have received (4 De G. M'N. & G. 852). This rule was adopted, *totidem verbis*, by V.-C. Wood in *Penny v. Avison* (3 Jur. N. S. 162). But see Lord Cranworth's subsequent observations in *Mayor of Berwick v. Murray*, 7 De G. M'N. & G. 579.

2. Trustees investing the trust funds in trade are chargeable with interest at 5 per cent., unless the beneficiary elect to take a share of profits (*Robinson v. Robinson*, 1 De G. M'N. & G. 257; *Williams v. Powell*, 15 Beav. 461;

Att-Gen. v. Solly, 2 Sim. 518; and see p. 28, *supra*). In the more recent cases, trustees under such circumstances have been charged with compound interest (*Jones v. Fozall*, 15 Beav. 388; *Williams v. Powell*, *supra*; see *Walker v. Woodward*, 1 Russ. 171; *Heighington v. Grant*, 5 M. & Cr. 258).

3. The Courts have a discretionary power to charge the trustee with 5 per cent. interest, either simply or with yearly rests, where there has been either a breach of an express direction to invest, or actual corruption or misfeasance, amounting to a breach of trust (*Lewin, Tr.*, 4th Ed. 355). "Where," said Lord Eldon "there is an express trust to make improvement of the money, if he will not honestly endeavour to improve, there is nothing wrong in considering him to have lent the money to himself upon the same terms upon which he could have lent it to others;" and accordingly he affirmed a decree awarding interest at 5 per cent., with half-yearly rests (*Raphael v. Boehm*, 11 Ves. 107).

The result of the English authorities was estimated by Sir J. Romilly in *Jones v. Fozall*, and embodied in three propositions:—(1.) That if a trustee retained balances in his hands which he ought to have invested, he was chargeable with simple interest at 4

the distribution or investment of the funds committed to their custody, will be liable in payment of legal interest for the time during which the money has been unnecessarily retained; and if to the omission to invest there has been superadded a positive breach of duty, as by intromitting with and employing the money for their own profit, they will also be liable for such accumulations of interest as the fund would have yielded had it been properly invested.

If a trustee be guilty of unreasonable delay in accounting for the funds in his hands to the beneficiary, after the period of distribution has arrived, he will be charged with interest from the period when the beneficiary ought to have been put into possession, even although, from the situation of the property, it has not actually been yielding a return (a). He is also liable in interest to the creditors of the trust estate if he neglect to settle timeously (b), though it would appear that interest on debts is not exigible until a year after the testator's death; that being allowed as a reasonable interval for the collection and realization of the assets (c).

Simple interest chargeable in respect of unreasonable delay.

Tutors, factors, and other judicial officers, are bound to deposit in bank all monies falling under their care as soon as received, and to accumulate the interest thereon, until a more productive investment can be obtained; and if they neglect this duty, they will be charged with the interest that would have accrued upon an investment (d).

Factors, etc., chargeable with interest, as upon an investment.

For the same reason, if a trustee for behoof of creditors (e), or

Trustees for behoof of Creditors.

per cent. (2.) That if, in addition to such retention, the trustee had committed a direct breach of trust, or had withdrawn the fund from a proper channel of investment, in which it was producing 5 per cent., he would be charged with interest after that rate. (3.) That if he had employed the money in trade or speculation for his own benefit, he would be charged either with the actual profits or with interest at 5 per cent., with yearly rests (15 Beav. 392).

(a) *Lord Lynedoch v. Ouchterlony*, 20 Nov. 1832, 11 S. 60; *Elphinstone v. Keith*, 1790, M. 4067.

(b) *Arbuthnott v. Arbuthnott*, 1758, M. 539; *Graham v. M'Nab*, 18 Nov. 1822, 2 S. 22.

(c) Bell's Com. 658. See *Cranstoun v. Scott*, 1 Dec. 1826, 5 S. 62; *Elphinstone v. Keith*, *supra*, and Chapter XVI. Section 3 (Payment of Debts).

(d) 12 & 13 Vict. cap. 51, §§ 5 & 37. See Act of Sederunt, 13 Feb. 1730; Statute 1672, cap. 2; *Mollison v. Murray*, 19 Dec. 1833, 12 S. 237; *Murray v. Murray*, 30 May 1833, 11 S. 663; *Cranstoun v. Scott*, *supra*; *Montgomery v. Wauchope*, 4 June 1822, 1 S. 421; *Blair v. Murray*, 4 July 1843, 5 D. 1315; *Buchanan v. Mackersy*, 13 Feb. 1847, 9 D. 700.

(e) *M'Clymont v. Hughes*, 14 Feb. 1827, 5 S. 346; *Campbell v. Keith*, 9 July 1840, 2 D. 1367.

upon a sequestrated estate (a), is guilty of unreasonable delay in regard to the distribution of the estate, or neglects to consign a sum to meet unclaimed dividends, he must account for the money, with interest from the time the breach of duty commenced. But he is entitled to retain a reasonable sum in his hands for the purpose of defraying the costs of litigation or other current expenses of the trust; and for this of course he cannot be charged with interest (b).

Liability for
penal interest
or profits
upon money
retained in
the Trustee's
hands.

We have already seen (c) that the employment of the trust funds in business, or for the accommodation of the trustee, is a breach of duty entailing liability for the profits actually earned; the principle being, that the whole produce of the fund is to be restored, as if the investment had been expressly made for the benefit of the trust (d). If, instead of directly investing the money in his business, the trustee, either personally or through his factor, simply retains it, or places the sum to the credit of his own bank account, as the amount of profit resulting from the use of the money cannot be exactly ascertained, the Court will exercise the option of either charging the trustee with the highest legal rate of interest, or with compound interest at a somewhat lower rate; 4 per cent. being the rate usually exacted (e).

Reason of the
above rule.

The liability to penal interest on trust money retained is not confined to those cases where the trustees may be supposed to have been influenced by personal motives, or in which the security of the estate is endangered. "A trustee," said the Lord President, delivering the judgment of the Court in *Wellwood's Trs. v. Boswell* (f), "who may also be acting as factor and agent for the trust, may be a person of unquestionable wealth and of undoubted solvency, but it does not appear to the Court that they can make any distinction between such a case and that of a person of less reputed wealth and more doubtful solvency; for it appears to them that it is the

(a) *Houston v. Duncan*, 20 May 1842, 4 D. 1220.

(b) *Ferrier v. Berry*, 8 July 1835, 13 S. 1081.

(c) See Chap. XVI., Section IV.

(d) *Laird v. Laird*, 28 May 1858, 20 D. 973; *Cochrane v. Black*, 16 July 1857, 19 D. 1019; *Duke of Roxburgh*

v. Swinton, 2 Mar. 1824, 2 Sh. Ap. Ca. 18.

(e) *Campbell v. Keith*, 9 July 1840, 2 D. 1367; *Wellwood's Trs. v. Boswell*, 17 Dec. 1856, 19 D. 187, 194, overruling *Fortune's Trs. v. Gillies*, 16 Nov. 1839, 2 D. 59; *Plaine v. Thomson*, 3 Dec. 1836, 15 S. 194.

(f) *Lord Colonsay*, 19 D. 194.

only safe course to require that the trust funds should be disposed of in a way which shall separate them from the proper funds of the person so managing them; and it is easy to do so by having a separate bank account, in which the trust funds will be deposited, and be accessible at all times." In this case, the factor to a trust had inadvertently allowed the balance of trust money in his hands to enter his private account, the estate having been at times indebted to him for advances. The Court, in the circumstances of the case, allowed interest to be charged on the annual balances at 4 per cent., such interest to be added to the yearly balance (a). If trustees have *de facto* accumulated the proceeds of a special trust fund put to a profitable employment, the amount of the accumulated sum will, on the principles above explained, represent the debt due by them to the beneficiary (b).

Wellwood v. Boswell.

The decision in *Wellwood's Trustees* is of some importance, because it has distinctly imported into the administration of trusts the principle of liability previously established by the Court in their official superintendence of the transactions of factors and guardians. Prior to the institution of the proceedings in the case of *Montgomerie v. Wauchope*, the notions prevalent in the profession, and with the judges of the Court of Session, concerning the accountability of factors, were extremely vague, and fraught with injustice to the pecuniary interests of the unfortunate persons whose estates were subject to judicial management. The attention of the Court of Session was then recalled to some important principles intimately connected with the theory of fiduciary administration, which would appear to have slept in the text-books since Lord Thurlow's famous decision in the case of the *York Buildings Company v. Mackenzie*. Among the questions put to the judges under the remit from the House of Lords, of 8th April 1816, the following are more immediately deserving of consideration in connection with the present subject:—"3. Is the mode of accounting ordered by the interlocutor of the First Division, of 2d July 1812, as between Lord and Lady Montgomerie and Mr Wauchope, agreeable to the law of Scotland? 5. In particular, is Mr Wauchope, by the law of Scotland, bound to account for the actual profits which he may have derived by the balances which at any time remained in his hands?"

The rule of strict accounting applies to Trusts as well as to Factories.

Montgomerie v. Wauchope.

(a) 19 D. 194.

(b) *Torrie v. Munsie*, 31 May 1832, 10 S. 597.

Judgment of
the Court.

The Court had previously found that Mr Wauchope, the factor, was chargeable with 5 per cent. interest upon his annual balances, but not with interest on receipts *de die in diem*; but upon reconsidering the case, they determined that, although not liable for actual profits, he ought, in the circumstances, to be charged with interest at 3 per cent. *de die in diem* to the end of each year, and that, within three months after closing each year's accounts, he should be considered as bound to have lent out on securities, bearing 5 per cent. interest, such part of the actual balances on hand as was consistent with the probable exigencies of the estate, and to be chargeable accordingly (a). Five per cent. interest, with annual accumulations, has accordingly been adopted in subsequent cases as the rule of accounting where factors have neglected the duty of investment (b); although in some exceptional cases, where the factor had acted as banker in making advances to the estate, a lower scale of interest has been awarded (c).

Where Trustees only chargeable with want of discretion, interest restricted to 4 per cent.

Where the charge against trustees amounts to no more than a want of discretion, shown in unduly deferring the settlement of claims, without having derived personal benefit from the delay, or where there has been remissness on the part of the claimant, the Court have modified the interest prestable to 4 per cent. (d), or even to bank interest, with such accumulations of interest as had been actually received (e).

Legal interest exigible when there has been culpable negligence.

Where, on the other hand, the trust funds have been lost in consequence of culpable negligence on the part of the trustees,—as, for example, by lending money on insecure investments, or by neglecting to superintend the intrusions of their factors,—the claim has uniformly been for payment of the principal sum, with legal interest; or, which is substantially equivalent, the lost money

(a) *Montgomerie v. Wauchope*, 4 June 1822, 1 S. 453; 4 Dow, 109; *Queensberry's Exrs. v. Tait*, 23 May 1822, 1 S. 428.

(b) *Cranstoun v. Scott*, 1 Dec. 1826, 5 S. 62; *Blair v. Murray*, 4 July 1843, 5 D. 315; *Buchanan v. Mackersy*, 13 Feb. 1847, 9 D. 700; *Duke of Roxburgh v. Swinton*, 2 Mar. 1824, 2 Sh. Ap. Ca. 18.

(c) *Condie v. M'Donald*, 20 Nov.

1834, 13 S. 61; *Roberts v. Macintosh*, 24 Jan. 1833, 11 S. 314; 5 June 1835, 13 S. 877; *Lambe v. Ritchie*, 14 Dec. 1837, 16 S. 219.

(d) *Lynedoch v. Ouchterlony*, 20 Nov. 1832, 11 S. 60.

(e) *Houston v. Duncan*, 20 May 1842, 4 D. 1220; *Williamson v. Suttie*, 20 July 1843, 15 Jurist, 637; *Campbell v. Keith*, 9 July 1840, 2 D. 1367.

has been objected to as an item of credit in the trustees' accounts. In no instance, among the numerous cases of defalcation that have occurred within the last thirty years, has interest been refused when demanded; although, from the omission of any mention of interest in some of the reported decisions, it may be inferred that the claimants had abstained from pressing for interest against the trustees. In *Ross v. Allan's Trustees* (a), the interlocutor of the Lord Ordinary, which was adhered to, expressly gave interest from a date, up to which the produce of the investment had been accounted for to the satisfaction of the beneficiary; and in *Blain v. Paterson* (b), the interlocutor of the Court, which gave interest only to its date, reserved to the parties all their claims for past interest, so far as not paid, against the defender. In other cases, where the conclusions of the action were for repetition of the misappropriated money, with interest, the Court gave decree in terms of the summons, or found the trustees bound to account for the money as if they had invested it (c).

Where trustees have disregarded express directions to invest the funds in particular securities, as, for example, landed property (d), or foreign securities (e), they have been held liable to payment, in addition to the capital, of a sum equal to the dividends or annual produce which might have been realized by means of the required investment.

Accumulated interest due where the Trustee has acted fraudulently or in breach of the Trust.

Where a fund has *never been recovered* by trustees, but has been inexcusably left outstanding and lost, the Court of Chancery, as Mr Lewin informs us, contents itself with holding the trustees liable for the principal, without obliging them to account for it as a productive fund (f). We are not aware that this exception to the ordinary rule of liability for interest has been sanctioned by our Courts; although, from the brevity of some of the reports, it has not always been possible to discover whether interest was

(a) *Ross v. Allan's Trs.*, 13 Nov. 1850, 13 D. 44, 46.

(b) *Blain v. Paterson*, 28 Jan. 1836, 14 S. 361, 374; and also in *Kennedy v. Wightman*, 28 June 1827, 5 S. 852.

(c) *Anderson v. Small*, 12 Feb. 1833, 11 S. 382; *Seton v. Dawson*, 18 Dec. 1841, 4 D. 310; *Mollison v. Murray*, 19 Dec. 1833, 12 S. 237; *Murray v.*

Murray, 30 May 1833, 11 S. 663. See *Greive v. Amos' Exrs.*, 24 June 1835, 13 S. 973; *Donaldson v. Kennedy*, 18 June 1833, 11 S. 740.

(d) *Pollexfen v. Stewart*, 9 Dec. 1841, 4 D. 224.

(e) *Sym v. Charles*, 13 May 1830, 8 S. 741, 743.

(f) Lewin on Trusts, 4th Ed. 257.

intended to be included in the decerniture fixing liability upon the trustees (a).

SECTION III.

LIABILITY FOR THE ACTS OF CO-TRUSTEES, AND CONVENTIONAL LIMITATIONS OF LIABILITY.

I. *Liability at Common Law and under the Trustee Act (b).*

Whether
Trustees are
liable in a
joint respon-
sibility.

It has been laid down by Professor Bell, that trustees are jointly responsible for the intromissions of any of their number, unless in so far as the truster, for himself and for those on whom he has bestowed the beneficial interest, shall have dispensed with this responsibility, and limited each trustee's obligation to the amount of his own actual intromissions (c). But the cases cited by the learned author (d) do not bear out his proposition; and on principle it may be affirmed, that trustees, as joint mandatories under a gratuitous contract, are only liable at common law for their own omissions and intromissions, and for the obligations of co-trustees to the extent to which they have authorized them, either expressly or by acquiescence. The rule of liability is so laid down by Mr Erskine in a passage where, after stating the rule of the civil law according to which mandatories were liable in exact diligence, he explains that, as regards trustees, including in that category both depositaries and gratuitous mandatories, the law of Scotland holds the trustee liable only in that degree of diligence which is suitable to the nature of the contract. "Our judges," he concludes (e), "have therefore governed them-

(a) See *Moffat v. Robertson*, 31 Jan. 1834, 12 S. 369; *Forman v. Burns*, 29 Jan. 1853, 15 D. 362.

(b) In many of the cases on liability, it will be observed that the defaulting trustee had the powers of a factor; so that the responsibility of his colleagues was partly that of co-trustees, and partly that arising from the obligation to appoint a solvent and trustworthy person as factor. Although all these cases have been cited

in the present section, some of them are more fully commented on in the following section, to which accordingly we beg to refer the reader.

(c) Bell's Prin. § 2000, 6.

(d) *Dalrymple v. Murray*, 1784, M. 16210, 3534; *Sym v. Charles*, 13 May 1830, 8 S. 741; *Wallace v. Taylor*, 28 Feb. 1832, 10 S. 364.

(e) Ersk. 3, 3, 36, and cases there cited; viz., *Earl of Wemyss v. Thomson*, 1672, M. 3515; *Sutherland v. Ross*,

selves on this point by the equity of the Roman law, as it has been already explained; by which a mandatory in a proper mandate, where no benefit accrues to him, is liable only for *actual intromissions*, or for such diligence as he employs in his own affairs" (a).

1683, M. 3516; *Irving v. Irving*, 1701, M. 3517; and see *Stair*, 1, 12, 10; *Bankt.* 1, 18, 11. This rule may be held to be fixed by the decision of the First Division in the case of *Thomson v. Campbell*, 16 Feb. 1838, 16 S. 560, noticed *infra*, p. 48.

(a) The principle that a trustee is not liable for the acts or defaults of his co-trustee, was established in England by a decision in the reign of Charles I., which has ever since been considered a leading authority (*Townley v. Sherborne*, 2 Wh. and T. 718). But in consequence of the qualifications with which the rule is now received, it must be admitted that it does not afford any very substantial protection to trustees. The qualifications we refer to are these:—(1) If injury result to the estate from the act or default of one of two co-trustees, and if the loss might have been prevented by the other, his negligence is a sufficient ground for subjecting him in liability (*Mucklow v. Fuller*, Jac. 198). (2) A trustee who joins in a receipt is *prima facie* considered as having received the money (*Brice v. Stokes*, 11 Ves. 319, 2 Wh. & T. 725). These limitations of the general rule of non-liability were introduced by Lord Eldon in the cases above referred to.

1. A leading case on liability for the acts of co-trustees by reason of negligence is *Booth v. Booth*, 1 Beav. 125. The testator bequeathed his personal estate to his partner and another executor in trust, for the benefit of his wife and family. They accepted and proved the will. The partner was allowed to retain the testator's money in the business, in consequence of

which it was lost. Lord Langdale, M.R., held that the co-executor, by proving the will, had undertaken the trust and the duty of performing it, and was therefore liable for the consequences of his omission. "The executor," said his Lordship, "unfortunately did not consider that, by proving the will, he had undertaken any duty or incurred any responsibility. He says he proved the will in consequence of the request of the widow, who informed him that he would not thereby undertake any duty, or be responsible for anything. It is important that it should be known that no one can safely act in that manner, and that the law will not permit a party to neglect the duty which, by proving the will, he has undertaken" (1 Beav. 125. See also *Dix v. Burford*, 19 Beav. 409).

Again, if an executor remains passive, and allows his co-executor to receive the assets, and retain them in his hands instead of investing them in proper securities, he is liable for the consequences of his neglect of duty, as if he had permitted the breach of trust (*Styles v. Guy*, 1 Hall & T. 523). Observing upon the duties of executors, Lord Cottenham said, "Of these duties a principal one is, to call in and collect such parts of the estate as are not in a proper state of investment. If he knows, or has the means of knowing, that part of the estate is not in a proper state of investment, but is held upon personal security only, and not necessarily so for the purposes of the will, is it not part of the duty which he has undertaken to interfere, and take measures, if necessary, for putting such property in a proper state

Limitation of
liability by
the Trustee
Act.

By the Trustee Act, 1861, the object of which was, as we understand, to declare, and, where necessary, to restore the common law in regard to the office of trustee, it is enacted that all trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated, shall be held to include, unless the contrary be expressed, a provision, "that each such trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions." Where, therefore, one trustee is sought to be made liable for the obligation of another,—whether

of investment; or is it no part of his duty, because the property is in the hands of a co-executor, and not of any stranger to the estate? It is impossible to find any principle for any such distinction" (1 M'N. & G. 431; see also *Egbert v. Buttler*, 21 Beav. 560; *West v. Jones*, 1 Sim. N. S. 205).

2. With respect to receipts, a distinction is taken between the case of co-executors and co-trustees. Any one executor in England is competent to give a discharge; and therefore, if another executor, who does not actually receive, joins in the discharge, he is to be considered as assuming a power over the fund, and is therefore answerable for the application of the money (per Lord Eldon in *Brice v. Stokes*, 11 Ves. 319). If, however, one executor has already received the money, the subsequent execution of a discharge by the co-executor has been said to be unnecessary, so that the executor is not liable for merely signing a document which has no legal effect (*Westley v. Clarke*, 1 Eden, 357; *Joy v. Campbell*, 1 S. & L. 341).

An executor, it is held, is not safe in relying upon the representation of his co-executor that the money is wanted for the purposes of administration; for it is part of his duty to make himself acquainted with the situation of the trust affairs (*Lord Shipbrooke v. Lord Hinchinbrooke*, 11 Ves. 252, 16 Ves. 477; *Underwood v.*

Stevens, 1 Mer. 712). The executor, in the event of proceedings being taken, is of course entitled to an inquiry how far the funds have been profitably applied (*Williams v. Nixon*, 2 Beav. 472; *Hewitt v. Foster*, 6 Beav. 259).

3. As regards trustees, it was held in some of the older cases, that as all the trustees must subscribe to make an effectual receipt, there was room for the inquiry whether any of them had not signed for the sake of conformity (*Fellows v. Mitchell*, 1 P. Wms. 81; *Brice v. Stokes*, *supra*). The principle involved in such an inquiry is obviously unsound; for a trustee has no right to join in any act for the sake of conformity; he is bound to see to the application of the money, and ought to be answerable for the omission. Accordingly, in the later English cases, the broad principle has been recognised, that the signing a discharge implies receipt of the money, and is an act of intromission. See *Thompson v. Finch*, 22 Beav. 316, where one subscribing trustee invested the money in improper securities, and the other was held liable; *Hanbury v. Kirkland*, 3 Sim. 265, where liability was incurred in consequence of the co-trustee having absconded with the trust funds in his possession; and *Wilkins v. Hogg*, 31 L. J. Ch. 41, cited *infra*, p. 49, where the true principle of liability was laid down by Lord Westbury.

resulting from contract, from *culpa*, or from misfortune, *e.g.*, in the case of insolvency,—the question always is, whether the trustee against whom liability is sought to be enforced, has been a party to the obligation (a).

First, as to contracts. It was settled, as we have already seen, by the judgment of Lord Eldon, affirming the decision of the Court of Session, that in the case of contracts with third parties, those trustees who actually contracted were alone responsible (b). The principle of this decision must, we think, be held to determine any question of collateral liability to the beneficiary in respect of the injury he may sustain through the trustees' contract.

Responsibility
for the con-
tracts of Co-
trustees.

Again, with reference to liability for fraud or gross mismanagement, the recent decisions upon the liability of bank directors establish clearly the proposition, that reparation for a breach of trust is only exigible from a person holding a fiduciary position in respect of his own personal acts, or such acts of his colleagues or subordinates as he has either adopted or directly authorized (c). These

Trustees not
jointly respon-
sible for fraud.

(a) 24 & 25 Vict. cap. 84, § 1. By the Scottish Statute 1696, cap. 8, the appointers of tutors-nominate were, on considerations of expediency, empowered to limit the liability of their appointees in a similar manner. The statute narrates, "That tutors nominate by a father to his children are persons in whom he reposes the greatest trust; and that the tutors nominate frequently decline the office, being unwilling to subject themselves to the hazard of omissions, of being obliged, *in solidum*, each of them for others;" and provides, "that it is and shall be lawful for the father, by any act or deed in his *liege pousie*, to make a nomination of such persons as he thinks fit to be tutors, and of such persons as he thinks fit to be curators to his children, during their minority, containing this provision and quality that the said tutors or curators shall not be liable for omissions, but for their actual intromissions with the means and estate descending from the father, and other deeds of administration

thereanent; and that each of them shall only be liable for himself, and not *in solidum* for others," etc. Where trustees are also appointed tutors and curators, it is essential that the limitation of liability should be inserted in the deed of the testator, if it is desired that they should have the benefit of the statutory protection. And in any circumstances it is proper that gratuitous trustees should have all the protection which the amplest indemnity clause can give them.

(b) *Higgins v. Livingstone*, 1 July 1816, 6 Paton, 244. See also *Fairlie v. Neilson*, 18 Dec. 1821, 1 S. 242; *Murray v. Campbell*, 28 Nov. 1827, 6 S. 147.

(c) *Western Bank* cases, 19 Mar. 1862, and 16 Feb. 1861, 23 D. 561; *National Exchange Co. v. Drew*, 27 July 1860, 23 D. 1; *Cullen v. Johnston*, 16 Feb. 1861, 23 D. 574; *Davidson v. Tulloch*, 23 Feb. 1860, 3 M'Q. 783; but see *Orr v. Glasgow, Airdrie, & Monklands Ry. Co.*, 24 Apr. 1860, 3 M'Q. 799.

decisions have an important bearing on the present question; for obviously the liability of a gratuitous trustee cannot be greater than that of a director. Where fraud or gross negligence is concerned, distinctions founded on the character of the contract disappear. *Culpa tenet suos auctores*, and liability attaches to all who participate in the breach of trust, whether occupying the position of trustees, or of salaried managers or directors.

Liability of Trustees in respect of their subscriptions to receipts.

But the class of cases with which we are mainly concerned, are those that occur where trust money has been uplifted or reduced into possession by one trustee, either upon the receipt of the whole body or a quorum, or with their acquiescence; and liability is attempted to be enforced against the consenting trustees, as constructive intromitters, or as parties to the fraud of the trustee to whom the money was paid. One principle applicable to such cases is, that the signing of a receipt is an act of intromission; and therefore, if the subscribing trustees have been negligent of their duty, *e.g.*, by leaving the money in the hands of a colleague, they cannot defend themselves against a personal action on the ground that they had not intromitted (*a*).

Whether liability attaches where money entrusted to Co-trustee for specified purposes.

The further question then arises, whether the subscribing trustees (assuming that they are chargeable in the first instance with the money which was paid to them on their receipt) can discharge themselves by alleging that they had paid it over to their co-trustee, to be applied by him towards the purposes of the trust. The answer is, that they are bound to see that he so applies it. If, therefore, the money has been allowed to remain in his hands or subject to his control for any considerable time, the other trustees are answerable for any loss accruing through his insolvency or otherwise (*b*). But if the custody of money is temporarily entrusted to one trustee for a specified purpose, as, for example, for distribution amongst legatees or creditors (*c*), or is received by a trustee or factor in the ordinary course of management (*d*), and the

(*a*) *Seton v. Dawson*, 18 Dec. 1841, 4 D. 310; *M'Clymont v. Hughes*, 14 Feb. 1827, 5 S. 346.

(*b*) *Ibid.* *Blain v. Paterson*, 28 Jan. 1836, 14 S. 361; *Moffat v. Robertson*, 31 Jan. 1834, 12 S. 369.

(*c*) *Urquhart v. Brown*, 7 June 1843, 5 D. 1142; *Ainslie v. Cheape*, 6 Feb. 1835, 13 S. 417; see Lord Corehouse's note.

(*d*) *Thomson v. Campbell*, 16 Feb. 1838, 16 S. 560. See *M'Nair v. Broomfield*, 24 June 1830, 8 S. 969.

trustee becomes insolvent or absconds before the money has been in his hands for such a length of time as would give rise to suspicion or put the other trustees upon inquiry as to the manner in which their commission has been executed, there is then no negligence, and therefore no joint liability.

The defence that the money was entrusted to one trustee for a special purpose, and not in the way of a general delegation of the trust, is not *per se* sufficient; for it is the duty of all the trustees to see that their directions are obeyed. Accordingly, where trustees paid over a sum of money to one of their number in order that he might invest it in the purchase of American stock, in the names of certain parties, as directed by the trust settlement, and on inquiry being made some years after it was found that the money never had been invested, and the acting trustee was insolvent, the trustees who had joined in granting the receipt when the original investment was called up were held responsible for the loss (a).

Liability may attach if Trustees neglect to see to the application of the money.

In the case of a joint appointment of trustees for behoof of creditors, if both trustees accept, and allow their names to be used in proceedings for vesting the bankrupt's estate in their persons, they are held to have intromitted jointly; and if, through the negligence of one of their number, his colleague is allowed to get possession of the entire estate, and becomes insolvent, the co-trustee is liable on the principle above explained (b).

Liability where Estate vested in the person of the defaulting Trustee.

A fortiori, if one of a body of trustees is allowed to get possession of the funds upon the receipt of the whole body, and they leave the entire management in his hands, neither attempting to reclaim the funds nor to check his accounts, they will be liable as intromitters in the event of a deficiency (c).

Delegation of the duties of the Trust.

The liability of executors appears to be the same as that of testamentary trustees. In several of the cases cited above, the trustees were also executors (d).

Liability of Executors.

While it is clear beyond doubt that an assumed trustee cannot be liable for the defaults or erroneous payments made by his predecessors in the trust, it would seem that the representatives of the

Liability of assumed Trustees.

(a) *Sym v. Charles*, 13 May 1830, 8 S. 741.

(c) *Seton v. Dawson*, *Blain v. Patterson*, *supra*.

(b) *M'Clymont v. Hughes*, 14 Feb. 1827, 5 S. 346.

(d) See, in addition, *Carruthers v. Hall*, 25 Nov. 1830, 9 S. 66.

latter may be reached through an action directed against the assumed trustee. And so, if an order is pronounced upon an assumed trustee to consign a sum which had been misapplied prior to his acceptance, he may compel the representatives of his former colleague, by an action in his own name, to implement the order for consignment, as well as to relieve him of the defence of the action of distribution (a).

Joint liability
of Tutors
under the
Statute 1672.

Tutors neglecting to make up inventories are liable, under the statute of 1672, *singuli in solidum*, and for omissions as well as intromissions (b). Trustees, therefore, who expressly accept the office of tutors, may incur penal liability in terms of the statute (c); but if they are only liable on a general acceptance of a deed in which they are appointed tutors and curators as well as trustees, it is thought that their title as trustees would be sufficient to shield them from liability on the ground that they had acted as tutors without authority.

II. Conventional Limitation of Liability.

Example of a
clause restrict-
ing the liabi-
lity of Trustees.

For the more effectual protection of trustees against liability for omissions, or for the default of their co-trustees and factors, an express clause of indemnity is usually inserted in the trust settlement. An example of such a clause will be found in the Juridical Styles. It is as follows: "And I hereby declare that my trustees shall nowise be liable for any omissions in management, nor for the omissions and neglects of their factors, agents, or cashiers, nor for the responsibility of them or their cautioners, if caution shall be required, or for the responsibility of the debtors, purchasers, or others, with whom my trustees may transact; but that they shall only be bound to act honourably, and shall nowise be liable *singuli in solidum*, or for one another, but each for himself only, and for his own personal intromissions or wilful default, and no further" (d).

(a) *Ogilvie v. Boswell*, 24 May 1850, 12 D. 940.

(b) *Murray v. Murray*, 30 May 1833, 11 S. 663.

(c) As to the statutory limitation of the liability of tutors, see the Act 1696, cap. 8, quoted *supra*, p. 41; and *Moffat v. Robertson*, 31 Jan. 1834, 12 S. 369.

(d) Jurid. Styles, 4th Ed. I. 245. See similar clause exempting tutors and curators from the statutory liability, p. 270; Duff on Deeds, 172. In any clause of exemption of tutors, the statutory form should be substantially followed. See p. 41, *supra*.

A similar clause, but more anxiously expressed, has been usually inserted in English trust deeds; and by Lord St Leonards' Act every instrument creating a trust is now deemed and taken to include an indemnity clause in the usual form, as specified in the Act (a); which provides in substance that trustees shall be respectively chargeable only for such monies as they shall respectively receive, notwithstanding their signing any receipt for the sake of conformity; that they shall be answerable for their own acts and defaults, but not for any banker or other person with whom monies or securities may be deposited, nor for the insufficiency of securities, nor for any other loss, unless happening through the trustees' own wilful default. The terms of the indemnity clause of the Scotch Trustee Act, as already observed, are: "That each such trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions" (b).

English Clause of Indemnity,

held to be incorporated with new Trusts.

With reference to the English clause of indemnity, Mr Lewin observes (c), that while it informs the trustee of the general doctrine of the Court, it adds nothing to his security against the liabilities of the office; for, as equity infuses such a proviso into every trust deed, the expression of the doctrine of the Court can give the trustee no greater immunity than if it had been left to implication. If we are right in the views expressed in the preceding pages respecting the liability of trustees under the law of Scotland, it would seem that the usual clause of indemnity in Scotch deeds is merely declaratory of the legal doctrine of liability,—an opinion in which we are supported by the late Mr Duff, who observes (d): "There appears, indeed, to be no real difference in a question of responsibility, whether as regards intromissions or the actings of a factor, between trustees without a clause of immunity, and those possessing a clause in the terms usually employed; for it would seem to result from the more recent

The ordinary Indemnity Clause does not seem to add anything to the security of Trustees.

(a) 22 & 23 Vict. cap. 35, § 31.

(b) 24 & 25 Vict. cap. 84, § 1.

(c) Lewin, Tr., 4th Ed. 211, and cases there cited. The latest case is *Brumbridge v. Brumbridge*, 1 Beav. 525, where a trustee was held liable for money deposited in bank when no further investment was in view. See the important case of *Wilkins v. Hogg*, 31

L. J. Ch. 41, commented upon *infra*, p. 49.

(d) Duff on Deeds, 172. But see the opinion of Professor Menzies to the contrary (Conv. p. 684), founding on *Traquair's Trs. & Graham v. Hunter's Trs.*, cited *infra*; and *Dalrymple v. Murray*, 1784, M. 5384.

cases, that the words, *each for his own actual or personal intromissions only*, hitherto supposed of so much practical importance in protecting trustees, are controlled by the effect of a joint discharge, which has been held to imply individual intromission on the part of all the subscribers." The reader, however, will judge of the value of the usual indemnity clause from the decisions to which we are about to call attention, and in which the terms of the clause proved inadequate to protect the trustees against liability for culpably entrusting the trust funds to a single trustee.

Examples of the enforcement of joint liability notwithstanding of the usual Indemnity Clause.

In one of the earliest cases (*a*), where a sum of L.160 was received by one of the trustees as part of the price of the trust estate, upon the joint receipt and disposition of the whole body, and that trustee became insolvent, a judgment of Lord Fullerton, exonerating the other trustees, but finding no expenses due to them, was acquiesced in; but the trustees having afterwards reclaimed on the point of expenses, an opinion was intimated that the trustees had been let off too easily. It appears from Lord Fullerton's note that the effect due to the usual clause of indemnity did not enter into the grounds of his judgment, but that he had proceeded on the view, afterwards found to be erroneous, that the joining in a receipt was not an actual intromission. In a case which occurred a few years later (*b*), trustees who neglected to realize an outstanding personal bond were held jointly liable for the consequences of their negligence, notwithstanding that the settlement contained a clause of indemnity in the usual form, commencing with a declaration that the said trustees "shall be noways liable for neglects or omissions, nor for not doing diligence, nor in solidum" (*c*).

Blain v. Paterson.

The effect due to the usual indemnity clause was carefully considered in the subsequent case of *Blain v. Paterson* (*d*). Although the judges did not go the length of asserting in express terms that such clauses add nothing to the force of the common law protection against joint and several liability, the decision was virtually an affirmance of that proposition. The opinion of the Court upon the point may be collected from the introductory observations of Lord

(*a*) *M'Nair v. Broomfield*, 24 June 1890, 8 S. 969. A similar opinion was indicated in *Grieve v. Amos' Exrs.*, 24 June 1895, 18 S. 973.

(*b*) *Moffat v. Robertson*, 31 Jan. 1894, 12 S. 369.

(*c*) 12 S. 370.

(*d*) *Blain v. Paterson*, 28 Jan. 1896, 14 S. 361.

Balgray, who said: "In the first place, it will be observed that the clause of protection is as ample and complete as any one which I ever saw. . . . And the truster was entitled to confer as extensive powers on his trustees as he chose, and to surround them with as strong protections and immunities as he thought right for encouraging them to undertake the gratuitous office which he imposed on them. Of all this the parties who take up the trust estate have no right whatever to complain, and of all this the trustees must have the most ample benefit" (a). But with every desire to give effect to the truster's kindly intentions, the judges felt bound to lay down the rule that the subscription of receipts was an act of personal intromission, rendering all the subscribing trustees responsible for the default of the trustee who had actually received the money. On the other hand, a trustee who had accepted, but who had not sanctioned any act of intromission, was held exempt from liability.

Distinction taken in the case of an accepting Trustee who had not acted.

In the subsequent case of *Seton v. Dawson* (b), which is now the leading authority on the question of joint liability, the Court appeared to have thought the indemnity clause (which in this case was expressed in conformity with the usual style) entitled to very little consideration. In the leading opinion of the consulted judges, in which the Lord Chancellor's judgment in *Home v. Pringle* (c) is adopted and applied, the principle was laid down, "that neither the protecting clause which occurs in this particular deed, nor any of the usual clauses framed for the same object, can be held to liberate trustees from the consequences of such gross negligence as amount to *culpa lata*" (d).

Seton v. Dawson.

The question may be considered as concluded by the case of *Home v. Menzies* (e), where, notwithstanding a very anxiously-worded clause of indemnity, an issue was sent to a jury, putting the question whether the defender "*wrongfully, and in contravention of his duty as trustee*", allowed the sum of L.4375, or thereby, being part of the trust estate, to pass into and thereafter remain in the hands of the said Alexander Robertson [a co-trustee and factor to

Home v. Menzies.
Form of Issue for trying question of personal liability.

(a) 14 S. 370.

(b) *Seton v. Dawson*, 18 Dec. 1841, 4 D. 310.

(c) *Home v. Pringle*, 22 June 1841, 2 Rob. 384; Lord Cottenham's opinion,

430. See this case commented upon in Section IV., *infra*.

(d) 4 D. 317.

(e) *Home v. Menzies*, 10 July 1845, 7 D. 1010; see p. 53, *infra*.

the trust], without taking any security therefor, to the loss, injury, and damage of the trust?" This, as it appears to us, is precisely the issue that must have been taken had there been no indemnity clause. The decision upon the bill of exceptions, sustaining a direction to the jury that the trustees were only liable if they acted in a grossly negligent and culpable manner, does not affect the point under consideration.

Circumstances in which Trustees have been held not responsible for the acts of Co-trustees.

It is true, that in various cases which have been noticed in the first division of this Section, trustees were found to be exempt from personal liability for the intromissions of their co-trustees, and that in several of those cases the terms of the indemnity clause of the settlement have been judicially commented upon as strengthening the presumption, arising upon the circumstances of the case, that the trustees were not to be held liable as intromitters. But it appears to us, that in the view taken by the Court as to the inference deducible from the facts forming the grounds of action in those cases, the trustees would have been entitled to indemnity independently of the terms of the usual clause of indemnity (a).

Trustees held to be only liable in a joint responsibility as for *culpa lata* or supine negligence.

This will be rendered more apparent by comparing the cases referred to with that of *Thomson v. Campbell* (b), where there was no indemnity clause, and yet the trustees were held exempt from personal responsibility for the defalcations of their factor. There was unquestionably some remissness on the part of the trustees—so much so, that Lord Corehouse thought they had rendered themselves responsible for the factor's intromissions. But the test of liability proposed by Lord President Hope was, whether the omission to examine into the factor's transactions "amounted either to *culpa lata* or to supine negligence" (c); and applying that test, a majority of the Court were of opinion that responsibility did not attach to the trustees.

How the liability of Trustees may be effectually restricted.

We have now to request the special attention of the profession

(a) The cases referred to are—*Earl of Traquair's Trs. v. Henderson's Trs.*, 6 Feb. 1835, 13 S. 417; *Carruthers v. Hall*, 25 Nov. 1830, 9 S. 67; *Graham v. Hunter's Trs.*, 4 Mar. 1831, 9 S. 543; *Urquhart v. Brown*, 7 June 1843, 5 D. 1142; *M'Millan v. Armstrong*, 6 Dec. 1848, 11 D. 191. See, upon this

point, the observations of Lord Gillies, in *Blain v. Paterson*, 14 S. 372, and the joint opinion of Lords Ivory, Gillies, and Murray, in *Seton v. Dawson*, 4 D. 318.

(b) *Thomson v. Campbell*, 16 Feb. 1838, 16 S. 560; see p. 53, *infra*.

(c) 16 S. 571.

to the recent decision of Lord Westbury in *Wilkins v. Hogg* (a), *Wilkins v. Hogg.* the principle of which is, that a settlor may absolve his trustees from liability for the consequences of *his own constructive intromissions*, by an indemnity clause expressly designating the particular class of acts or circumstances of culpable negligence, from the consequences of which he intends to relieve them. The clause was in these terms :—"And I declare that each trustee shall be answerable only for losses arising from his own defaults, and not for involuntary acts, or for the acts or defaults of his co-trustees or trustee; *and particularly*, that any trustee who shall pay over to his co-trustee, or shall do or concur in any act enabling his co-trustee to receive any monies for the general purposes of my will, or for any definite purpose authorized by my will, shall not be obliged to see to the due application thereof, nor shall such trustee be subsequently rendered responsible by any express notice or intimation of the actual misapplication of the same monies; but this clause shall not restrict the power of any trustee to require from his co-trustee an account of the application of monies in his hands, or to insist on his replacing monies misapplied by him."

There were three trustees of the will, who joined in signing and delivering receipts for money received from two insurance offices. One of the trustees, with the consent of his co-trustees, was allowed to retain the amount, on the representation that he would deposit it in one of the London joint stock banks, there to remain until an eligible investment could be found. He, however, appropriated the amount. On a bill filed, seeking to make the co-trustees liable, Lord Chancellor Westbury (affirming the decision of Vice-Chancellor Stuart) held that they were protected by the clause of indemnity. Adverting to the declaration commencing with the words, "And particularly," the Lord Chancellor observed, that the person who framed that clause must have been aware that if three trustees received money, each would be answerable for it *in solido*; but here the case provided for was that of a trustee, being himself the receiver, and then handing the money to his co-trustee for the purposes of the will; in which case, the testator said he should "not be obliged to see to the due application thereof." That ex-

Opinion of
Lord Ch.
Westbury.

(a) *Wilkins v. Hogg*, 31 L. J. Ch. 41, affg. decree of Stuart, V.-C., 30 L. J. Ch. 492.

cluded a second ordinary rule of the Court; because a trustee, knowing another trustee had received money, was not relieved from the duty of seeing to the application of it. After adverting to the proviso with regard to notice of misapplication, his Lordship concluded,—“The trustee was then exempted from obligation; first, when he received the money, and handed it over to another trustee without further concern; secondly, when he permitted his co-trustee to receive the money, and made no inquiry as to its application; thirdly, when he became aware of a misapplication by his co-trustee, and wilfully abstained from noticing it. These three grounds of liability were well known, and they were met by words forcible enough to prevent their operation. There remained, then, a personal misapplication, for which a trustee would be liable. The bill raised no case of a knowledge on the part of the defendants, that the money was likely to be made away with. The ordinary grounds of liability were carefully provided against by this clause; and the liability upon which it was sought to fix these defendants was not within the limited liability which this will imposed on them” (a).

SECTION IV.

LIABILITY FOR THE ACTS OF FACTORS.

The grounds of liability are very similar to those which we have had occasion to consider in connection with the subject of liability for co-trustees; the chief difference being, that as a factor is, by the nature of his appointment, invested with a larger measure of responsibility, and with more extensive powers than belong to an individual trustee, the Court will not so readily assume that a trustee is culpably negligent, merely because the factor fails with funds in his possession. However, the instances in which trustees have been found personally liable for the defalcations of factors are sufficiently numerous to show the necessity of exercising a watchful supervision over the transactions of persons in that situation.

(a) 31 L. J. Ch. 43, 44.

The questions to be considered relate, first, to the degree of responsibility which the trustee incurs to the trust estate, or, to speak more accurately, to the beneficiary, in consequence of the intrusions or omissions of his factor; and secondly, to the responsibility of the trustee to strangers, in consequence of the power which the factor must possess of binding the trust estate in transactions within the scope of his powers.

Responsibility
(1) to the
Beneficiary;

(2) to persons
with whom
Factor con-
tracts.

It has been usual, where a power of appointing factors is given *per expressum*, to introduce a conventional limitation of the trustees' responsibility, by a clause declaring that they shall not be liable for the intrusions or solvency of the factors whom they employ, accompanied sometimes with the proviso that such factors are habit and repute responsible at the time of their employment. As to the latter proviso, we have already had occasion to remark that trustees, if they discharge the duties of their office with honesty and reasonable attention, are not liable for loss accruing to the trust estate through the fault of others; and therefore, if the appointment of a factor with the usual powers is, in the circumstances of the trust, a beneficial act of administration, we do not know that any higher degree of diligence can be exacted from the trustee in the matter of *appointment*, than that he should appoint a qualified person, habit and repute responsible at the time (a). This simple consideration leads to the conclusion, supported, as it will be seen, by decisions of the Court of Session and the House of Lords, that words of indemnity of the nature referred to do not materially affect the liability of the trustees (b).

Responsibility
of the Trustee
as regards the
propriety of
the appoint-
ment.

Trustees, however, are bound to exercise a general supervision over their factor's transactions, by periodically checking his accounts, and keeping themselves informed (as every intelligent man of business would do where his own property was at stake) as to his character and credit. The neglect of these duties may involve the trustees in a pecuniary responsibility for the factor's transactions (c).

Trustees bound
to superintend
the Factor's
transactions.

(a) The Trustee Act is silent on the subject of liability for factors.

(b) *Home v. Pringle*, 22 June 1841, 2 Rob. 384, affg. 16 S. 142; *Home v. Menzies*, 10 July 1845, 7 D. 1010; *Thomson v. Campbell*, 16 Feb. 1838,

16 S. 560; and cases cited in the previous Section.

(c) *Sym v. Charles*, 13 May 1830, 8 S. 741; *Stewart v. Mackenzie*, 27 May 1834, 12 S. 636; *Ainslie v. Cheape*, 6 Feb. 1835, 13 S. 416; and cases, in Chapter XVI. Sect. I.

Independently of personal considerations, a trustee ought to consider that he owes this duty to the beneficiaries, whose interests he has undertaken to protect.

Home v. Pringle.

The leading case on the liability of trustees for their factors, is that of *Home v. Pringle* (a), in which the judgment of the Court of Session, defining the limits of responsibility, was affirmed on appeal. Mr Home of Wedderburn, by his trust disposition, conveyed his fee-simple estates to trustees for the purpose of receiving the rents during the minority of his heir, to be applied by them in the payment of debts and bequests, after which the estates were to be conveyed in the form of a strict entail to the heirs of the settlement. The trustees were to be allowed L.100 sterling for their trouble in the management; but this provision was held to be immaterial to the question of liability. A general power of appointing factors was added, with the proviso, that the trustees should not "be further liable for their factors than that they shall be habit and repute responsible at the time of entering on their office." The trustees appointed a factor, who was a writer to the signet, of respectable professional standing, and possessed of property. This gentleman, after a course of management extending over several years, became bankrupt, leaving a balance due by him to the trust estate of upwards of L.1600; although the report says that he had enjoyed the highest credit for solvency and responsibility until within a day or two of his declared bankruptcy. The principal charge against the trustees was, that though they had appointed a solvent factor, they had failed to subject him to proper periodical accountings. The House of Lords concurred with the Court of Session in finding that this charge was not established, although it appeared that there had been occasionally some delay in the settlement of his accounts, and that in the periodical balances the transactions were not brought down to the period of settlement; and, on the whole, their Lordships were of opinion, that although the factor might have been more strictly looked after, there was no culpable failure of duty either on the part of the trustees generally, or of one of their number who had been appointed cashier, and had taken the principal share in the management. Such being the judgment of the Court of Appeal on the matter of fact, it was unequivocally laid

To render the Trustee liable, it must be proved that he has neglected the duty of checking the Factor's intrusions.

Mere delay in settling is not to be visited with the penalty of personal liability.

(a) *Home v. Pringle*, 22 June 1841, 2 Robinson, 384, affirming 16 S. 142.

down by the Lord Chancellor, that no clause of indemnity could shelter the trustees from the consequences of gross negligence, and that the supervision of their factor's transactions was an imperative duty, the neglect of which must entail pecuniary liability (a).

The case of *Sym v. Charles* (b) illustrates the principle, that where trustees delegate a duty to the factor, they must see that he performs it. The trustees, although not specially authorized to do so, had granted a factory to one of their number, who proceeded to realize the funds, and paid off all the legacies excepting one of L.500 sterling, left to a lady in America, and which was directed to be invested by the trustees in American stock. In the accounts rendered to the trustees, credit was taken for this legacy as paid, although in point of fact the factor had appropriated the sum, and afterwards died insolvent. An action having been brought for payment of the legacy, the Court decerned against the trustees personally for the amount, with interest; being of opinion that the neglect to satisfy themselves by evidence that the legacy had been actually paid, was not a mere omission on the part of the trustees, but a virtual consent that the money should remain with the factor (c).

Liability for neglecting to see that Factor has performed the business deputed to him.

Sym v. Charles.

In *Home v. Menzies*, an issue was sent to a jury to try the question, whether a sum which was lost in consequence of the bankruptcy of a factor, had been allowed by the trustee to remain in his hands wrongfully, and in contravention of his duty as trustee. Lord President Boyle directed the jury in point of law, "that the defender and his co-trustee were liable if they acted in a grossly negligent and culpable manner; but that in order to subject them, it was incumbent on the pursuer to prove that they were guilty of gross and culpable negligence." This statement of the law was affirmed by the Court on a bill of exceptions, and the defender was accordingly assoilzied (d).

Home v. Menzies.

Ground of liability defined by Lord Pr. Boyle.

On the other hand, it has been settled by the judgment of the First Division in *Thomson v. Campbell*, that trustees are exempt from liability for the insolvency of a factor where the trust is such as to require the appointment of a manager, although the deed con-

Thomson v. Campbell.

(a) 2 Robinson, p.

(c) 8 S. 745, per Lord Glenlee.

(b) 18 May 1830, 8 S. 741; see also *Stewart v. Mackenzie*, 27 May 1834, 12 S. 636.

(d) *Home v. Menzies*, 10 July 1845, 7 D. 1010.

Ground of liability defined by Lord Fr. Hope.

tains no power of appointment and no clause of immunity, unless guilty of "*culpa lata* or supine negligence" (a). It may be inferred, therefore, that the rule of liability is the same, whether the deed contains an indemnity clause or not. Lord Corehouse, it may be observed, dissented from the judgment in the latter case, but only because he was of opinion that the actings of the trustees were tainted with *culpa lata* (b). The reports of subsequent cases may be consulted with reference to the circumstances from which culpability is to be inferred; but it is unnecessary to seek for further illustrations of the doctrine of liability (c).

Liability discharged by delay in the institution of proceedings.

Any unreasonable delay in the institution of proceedings against trustees for money lost through the maladministration of a factor or agent, will in general be fatal to the claim; for the trustee may thereby lose recourse against the factor; and it would be unfair that this, his only security against personal loss, should be put in jeopardy through the laches of the beneficiary (d).

The Factor's engagements bind the Trust Estate, if within his powers;

The subject of the liabilities of trustees to creditors of the estate having been considered in detail in the preceding Chapter, it would be superfluous to enter minutely into the special case of their liability for the obligations undertaken by their factors. The rule of law is that the estate is bound by the engagements of the factor, acting within his powers; but not for acts in excess of his authority. The trustee can only be made personally responsible for acts which he expressly authorized the factor to perform; for, as it is no part of the duty of a trustee to pledge his personal credit on behalf of the trust estate, it is still less to be presumed that a factor's authority extends to the execution of contracts or engagements tending to involve his constituent in personal liability.

but not the Trustee, unless he gave express authority.

Trustee must fulfil Factor's obligations *ad factum præstandum*;

It must be observed, however, that a trustee is liable *ad factum præstandum*, where performance is within his power; and therefore, if a factor duly authorized has carried through a sale of trust property, the trustee may be compelled by personal diligence to grant a

(a) *Thomson v. Campbell*, 16 Feb. 1838, 16 S. 560, per Lord Fr. Hope; see *Dalrymple v. Murray*, 1784, M. 3534.

(b) 16 S. 570.

(c) See *Cowan v. Crawford*, 13 May 1836, 14 S. 744; *Ainslie v. Cheape*,

6 Feb. 1835, 13 S. 416; *Sloan v. Auld*, 13 Dec. 1851, 14 D. 181; *Mabon v. Christie*, 8 Feb. 1844, 6 D. 619.

(d) *Dalrymple v. Murray*, 1784, M. 16210, 3534; *Cowan v. Crawford*, 13 May 1836, 14 S. 744.

conveyance (a). If specific implement has become impossible—as, for example, in consequence of the property having been carried off by an adjudging creditor—the trustee may be compelled to refund the price of the transaction out of his own pocket (b). There is of course a correlative obligation on the purchaser not to repudiate his transaction with the factor, on the ground that express authority from his constituent was wanting (c). If a factor or law agent to the trust were to enter into speculative transactions out of the ordinary course of trust management, it is clear that his obligations would not be enforceable against the trustee, although they might be a ground for personal diligence against the factor himself. Therefore trustees will not necessarily be liable for feu-duties in consequence of the purchase of lands for building purposes by the factor without authority (d); but the seller will of course be entitled to try the question whether authority was actually given (e).

unless beyond
the scope of
the Factor's
duties.

Acts of the factor or agent to a trust in excess of their powers, or in defraud of the trust, will no more be binding on the estate than would the acts of a trustee in similar circumstances. Thus, where an agent to a body of trustees conspired with one of their number, who was heir-at-law, to make up a title in that character, passing over the trust disposition, and afterwards accepted a disposition in security from the heir in security of advances, the Court, in a count and reckoning, found that the agent, being in the full knowledge of the trust deed, and of the acceptance and actual operation of the trust under which he admitted himself to be the acting agent, was in *mala fide* to create or to accept of the bond and disposition in security libelled on; that he had acted in *mala fide* in taking infestment on the disposition, and thereafter assigning the same to third parties for a valuable consideration; that whether the debt acknowledged by the bond was a just debt or not, the defender was bound in the first instance, and without waiting the adjustment of the trust accounts, to restore the estate *in integrum* against the

Obligations in
excess of the
Factor's
powers bind
neither the
Estate nor the
Trustees.

(a) *Thomas v. Walker's Trs.*, 4 July 1829, 7 S. 828.

(b) *Thomas v. Walker's Trs.*, 4 Dec. 1832, 11 S. 162—sequel of the above case.

(c) See *Innes v. Reid's Trs.*, 22 June 1822, 1 S. 556.

(d) *Gordon v. Cameron's Trs.*, 26 Feb. 1839, 1 D. 577; *Manners' Tr. v. Willison*, 22 Nov. 1831, 10 S. 43; see *Lyon v. Sibbald*, 16 Dec. 1823, 2 S. 591.

(e) *Manners' Tr. v. Willison*, *supra*.

real security created by the said disposition and infestment as now standing vested in his assignees. This judgment was affirmed on appeal (a).

(a) *Fraser v. Steven's Trs.*, 25 April 676; *Drummond v. Lindsay*, 13 June 1839, M'L. & Rob. 171, affg. 14 S. 1857, 19 D. 861.

CHAPTER XXV.

OF THE LIABILITY OF TRUSTEES FOR EXPENSES, AND THEIR RIGHT TO INDEMNITY.

THE subjects which are grouped together in this Chapter, although logically disunited, are in practice very closely identified, from the circumstance that questions relating to the liability of trustees for expenses of administration or of litigation very frequently involve the consideration of the correlative right of the trustee to be indemnified by the beneficiary. The principle that the trustee is entitled to be relieved of his obligations and disbursements on behalf of the estate, is implied in the fundamental idea of a trust; as no one can be supposed to charge another with the performance of a gratuitous service on his behalf, without undertaking to indemnify him against risks incident to the duty, and to defray the expense which it necessarily occasions.

SECTION I.

LIABILITY FOR EXPENSES OF MANAGEMENT.

As the trustee's office is gratuitous, it is not to be supposed that by accepting the trust he is bound to perform personally such duties as are capable of being executed by professional persons. Accordingly it has been decided that trustees are entitled to employ an agent for the transaction of the ordinary duties of trust management, and to take credit for his charges in accounting with the beneficiaries (a). If the business of the trust is such as to require

Trustee not bound to perform routine duties in person.

(a) *Hay v. Binny*, 19 Feb. 1861, 28 D. 594; *Stewart v. Wilson*, 20 May 1823, 2 S. 320; see the cases in *White and Tudor*, ii. 218. On the other hand, expenses occasioned by the trustee's own neglect will be chargeable against himself. See *Pet. A. B.*, 21 Dec. 1855, 18 D. 286, and cases

continuous management and supervision, it may be performed through the instrumentality of a paid factor (*a*). By the usual style of trust conveyances, trustees are authorized to appoint factors on the footing of professional employment; and even where no express power is given, their right to make such appointments has been recognised in numerous instances (*b*).

Subject
divided.

The questions which claim our consideration include, *first*, the liability of trustees for the accounts of agents, factors, and other persons claiming under a confidential employment; *secondly*, the trustees' right of retention; *thirdly*, his disqualification to accept remunerative employment under the trust.

Whether
Trustee per-
sonally liable
to Agents, etc.

1. We have seen, in treating of the liability of trustees to creditors of the trust, that in all transactions with creditors on the ordinary footing of contract, the presumption, in the absence of direct stipulation to the contrary, is that the trustee is personally bound to the fulfilment of his engagements, on the principle that parties who are strangers to the trust, and have no means of informing themselves as to the extent of the security which the estate affords, are entitled to rely upon the credit of the person with whom they contract. But it is obvious that this principle fails when applied to transactions between the trustee and persons employed as agents or factors, and standing in a confidential relation towards the trust. The position of an agent or factor gives him, in most cases, at least as ample, often a better opportunity of informing himself as to the situation of the trust estate and the security which it affords, than the trustee himself; and it is the duty of a paid agent to take care that those who are interested in the estate are not involved in liability for expenses to an extent exceeding the value of their interest. An agent is of course not bound to carry on a litigation, or an expensive course of management, at his own risk; but neither is he entitled to involve his constituent in indefinite liability for unprofitable

Agents are
presumed to
rely on the
security of the
Trust Estate.

cited *infra*, p. 69, *et seq.*; *Malcolm v. O'Callaghan*, 3 M. & C. 52; *Caffrey v. Darby*, 6 Ves. 488, 497.

(*a*) As to the employment of accountants, see *Peddie v. Beveridge*, 7 Feb. 1860, 22 D. 707.

(*b*) See Bell's Pr. § 1998; *Sym v. Charles*, 13 May 1830, 8 S. 741. If

the testator has nominated a factor, it has been considered that the trustees have not the power of removing him except on reasonable grounds. See *Fulton v. M'Allister*, 15 Feb. 1831, 9 S. 442; *Craig v. M'Aulay*, 22 June 1836, 14 D. 318.

expenditure. His duty, therefore, in the prospect of the estate being exhausted in expenses, is to require a personal guarantee for his expenses, either from the trustee or from the parties who have the beneficial interest; and if he does not take this precaution, the loss will fall upon himself; the presumption being that he is employed as agent for the estate, and not upon the personal responsibility of the trustee.

In the cases that have hitherto occurred, involving the element of the personal responsibility of trustees for the employment of agents, the question of liability has been treated rather as a question of fact than of law; but the opinions expressed support the view which we have stated. In the two cases of *Cullen v. Baillie* (a) and *Manson v. Baillie* (b), which arose out of the same trust, the question was complicated by the consideration that the agent who made the claim against the trustees was himself both a trustee and a beneficiary; but the doctrine of non-liability in the general case was plainly asserted by the judges. For example, in the first action, Lord President Boyle said: "The relation in which the pursuer Manson (c) stood in regard to all the defenders—the sacred obligation that lay on him, instead of taking such a commission, and acting on it as he did, *to make them fully aware of the whole business of the trust, and how he was conducting it*, together with what I hold to be the sound exposition of the law as given in the case of *Home v. Pringle* (d), . . . lead me to the conclusion that the action should receive no countenance whatever, but that the defenders should be assolizied from its whole conclusions" (e). Lord Mackenzie observed, on the assumption that Manson was legally appointed factor and agent, and that there was no *pactum illicitum*, the question was, whether Manson had any claim on the trustees beyond the trust funds. Considering that the trustees contracted as trustees—it being expressly stated that they did so contract—he thought they were not liable personally, unless there was *mala fides* or *culpa lata* on their part, in inducing the other party to believe that the trust

Liability to Agents is partly a question of fact.

Cullen v. Baillie.

(a) *Cullen v. Baillie*, 20 Feb. 1846, 8 D. 511.

(b) *Manson v. Baillie*, 19 June 1855, 2 Macq. 80. See also *Paterson v. M'Lelland*, 4 June 1824, 3 S. 103.

(c) The real pursuer was an assignee of Manson, the agent in the trust.

(d) *Home v. Pringle*, 22 June 1841, 2 Rob. 432.

(e) 8 D. 519.

Lord Fullerton's opinion.

funds were sufficient; and that, as factor, Manson was strongly called on, if he had the least contemplation of coming on the trustees personally, to give them notice of his proceedings. If he did not, he did not act fairly towards the trustees (a). Lord Jeffrey said, that looking to the circumstances from which employment was implied, the question which the Court had to consider was, what stipulation the parties would have expressed if they had been called on to do so, and whether it was to be conceived that the trustees really intended to pledge their personal credit (b). But the most distinct enunciation of the principle of non-liability is contained in Lord Fullerton's opinion, from which we extract the following passage:—"In regard to debts originating with the truster, and devolving on the trustees only by the force of the trust, there can be no doubt that trustees are bound only in their fiduciary character, consequently not *ultra valorem* of the trust estate. But in regard to debts contracted by the trustees themselves, although it may be *bona fide* for the trust purposes, they will be personally bound to third parties, unless it appear clearly from the terms of the transaction that the creditor expressly took the trust estate, as distinct from the individual trustees, as his debtor. In such cases it is held, and justly held, that the trustees, who are supposed to know their own trust affairs, are bound to warrant the sufficiency of the trust funds to the persons with whom they deal, and who have no such means of information. If the present claim, then, had been one brought by a person unconnected with the trust, for furnishings made or services performed on the employment of the trustees, it might have been sustained on the principle last alluded to. But the circumstances here are different, and very peculiar; and it is by the principles applicable to these peculiarities that the claim must be tested and determined." His Lordship then, after stating the circumstances, proceeded to observe that Mr Manson, by acceptance of the factory, undertook to make himself master of the whole details of the trust; an undertaking which, in a question between him and his co-trustees, was rather a warranty of the trust funds to them than from them to him, since it was Mr Manson's business to satisfy himself of the sufficiency of the funds before he incurred expenses which were rendered necessary by his own exclusive management.

(a) 8 D. 520.

(b) 8 D. 524.

The conclusion at which his Lordship arrived was, that to support the action, "it would be necessary for Mr Manson not only to show that the expenses were incurred under the factory, but that they were specially authorized and directed by the co-trustees, after being made distinctly aware that the trust funds were deficient; and that, in the event of the deficiency being permanent, the expense was to be made good by them" (a).

The reasoning of the Lord Chancellor (b) in the appeal case, while substantially in accordance with the opinions of the judges of the Court of Session, is so much interspersed with comments on the circumstances of the case, that it does not admit of being exhibited by quotations. The report, however, is deserving of careful study.

Manson v. Baillie.

It is scarcely necessary to add, that if a trustee deprives the agent of the security of the trust estate as by denuding before the trust accounts are settled, the agent will have recourse by a direct action against the trustee. This principle was given effect to in a case where a trustee, after granting a bill to the agent in a sequestration, acceded to a composition arrangement, and paid over the balance of the funds in his hands to the bankrupt, without providing for the payment of the bill (c).

Trustee denuding while Agent's claim is unsettled incurs a personal responsibility.

It is a question not free from difficulty, whether the expenses of agents and factors form a charge against the parties beneficially interested in the administration, in the event of the free estate having been exhausted by the costs of litigation or management. On this point the cases of *Cullen* and *Manson v. Baillie*, already referred to, are of some authority; because Sir William Baillie, one of the defenders in those actions, was not only a trustee, but one of the parties most largely interested in the estate, having been left a legacy of L.3000, with a share in the residue proportionate to his legacy. The decision of the House of Lords, absolving him from liability, is therefore a direct precedent, adverse to the supposition of such a claim. Although the principle of *Home v. Pringle*—viz., that the pursuer, being himself a trustee, was not entitled to sue for professional remuneration—was referred to, both in argument and in the opinions of Lords Cranworth and Brougham, the judgment was certainly not rested upon that principle. If it had been, the pursuer

Whether Agents have a claim against the Beneficiary in the event of the exhaustion of the Trust Estate.

(a) 8 D. 521-3.

(c) *Swan v. Wright*, 15 Jan. 1829,

(b) Lord Cranworth, 2 Macq. 82.

7 S. 268.

would have been entitled, at all events, to costs out of pocket; whereas in the actual decision his claim was wholly rejected, on the ground that the contract was not with the trustees or with the beneficiary, but with the trust estate.

Agent employed on a special contract, and not confidentially, has a claim against the constituent.

In the case of *Brodie v. Macfarlane's Creditors*, where a petition by an agent in a sequestration against the creditors, for payment of his account, was sustained, it appeared that a considerable sum had been actually recovered in the proceedings for which the account had been incurred, and that this sum had been divided amongst the creditors. They were therefore clearly liable in payment of the account to the extent of the benefits which they had received (a). The case may also be supported on a different principle, namely, that where an agent is not appointed directly by the trustees as their confidential adviser, but is employed by another agent to perform a specific piece of business, he is in the same situation as a tradesman employed under the trust, and is entitled, on the principle explained by Lord Fullerton in the passage already quoted, to recover from those by whom he was employed (b).

Members of Committees, Public Trusts, etc., liable for expenses which they have authorized.

Members of a provisional committee, for promoting a railway or other public undertaking, are not liable in payment of the accounts of agents or employees of the committee, unless they have expressly and individually sanctioned the employment, or undertaken to guarantee remuneration (c). Mere attendance at meetings of a committee does not infer liability for its engagements, unless the contract in question was sanctioned at a meeting at which the defender was present as a concurring party (d). The same principle is applicable to the liability of members of public trusts (e).

Whether Trustee has

2. If a trustee has paid expenses incurred on behalf of the trust

(a) *Brodie v. Macfarlane's Crs.*, 20 Feb. 1846, 8 D. 537. But see *infra*, p. 65, as to the exemption from liability of creditors claiming in a sequestration.

(b) *Brodie v. Macfarlane's Crs.*, *supra*; *Bell v. Izett's Trs.*, 9 June 1854, 16 D. 915. See Lord Fullerton's opinion, *supra*, p. 60.

(c) *M'Ewen v. Campbell*, 19 Feb. 1857, 3 Macq. 499; *Campbell v. Lauder*, 27 Nov. 1852, 15 D. 117; *John-*

ston v. Scott, 18 Jan. 1860, 22 D. 393; and see *Bright v. Hutton*, 3 H. of L. Ca. 341, where the doctrine of non-liability was laid down by the House of Lords on principles applicable to the jurisprudence of the whole United Kingdom.

(d) *Campbell v. Lauder, Johnston v. Scott*, *supra*.

(e) *Higgins v. Livingstone*, cited *supra*, II. 6.

out of his own pocket, and the funds ultimately prove insufficient to meet his claim upon the estate, the question, whether he is entitled to relief by a personal action against the beneficiaries, seems to depend on the circumstances of the transaction. Trustees, as a general rule, are only entitled to debit the beneficiaries with expenses profitably or legitimately incurred in promoting their interests; and it is difficult to see how the expenses of legitimate management could, in any ordinary case, exceed the value of the estate which was the subject of management. But let us suppose a case where trust funds have been lost through innocent misfortune; as, for example, where a settlor expressly directs his trustees to invest funds in shares, or other securities not authorized by the Court, and the security fails. In such a case, there could be no doubt, that if the beneficiaries had recognised the trust, they would be bound to relieve the trustees from any contingent liabilities arising out of the investment (a); and on the same principle we think they would be under an obligation to reimburse the trustees for the outstanding expenses of management. If beneficiaries expressly authorize a trustee to carry on litigation in their names, they must of course be liable to relieve him of his expenses, whether funds be recovered or not (b).

a claim against the Beneficiary for the expenses after the exhaustion of the Estate.

Where Trust Funds lost without fault on part of the Trustee.

Where the expense was authorized by the Beneficiary.

(a) See this point discussed in the previous chapter.

(b) *Jeffrey v. Bathgate Trs.*, 16 Dec. 1823, 2 S. 584; *Mercer v. Orr*, 11 Dec. 1823, 2 S. 574; and see *Graham v. Marshall*, 22 Nov. 1860, 23 D. 41. Mr Lewin is of opinion that, notwithstanding the exhaustion of the estate, the trustees have a claim upon the beneficiary, which may be enforced by action, for money expended in the prosecution of the trust purposes, and within the scope of their powers (Lewin, Tr., 4th Ed. 417, citing *Balsh v. Higham*, 2 P. Wms. 453; *Ex parte Chippendale*, 4 De G. M'N. & G. 19, 54). On the general rule, that trustees are entitled to be reimbursed for their expenses, it is unnecessary to cite English authority; but the following exceptions may be noted. Expenses of improper litigation, or litigation occasioned by the trustee's fault or

negligence, will be disallowed (*Malcolm v. O'Callaghan*, 3 M. & C. 52; *Caffrey v. Darby*, 6 Ves. 488, 497). If a trustee has neglected to keep an account of his expenses, the Court will make an estimate, on the principle of allowing a sum that may be less than, but cannot exceed, what he is entitled to claim (*Hethersell v. Hales*, 2 Ch. Rep. 158). A trustee who has incurred liabilities on behalf of his constituent may call upon the latter to indemnify him against the liability, before actual loss has accrued (*Phenè v. Gillan*, 5 Hare, 8, 9-13); and he may retain the trust estate until relieved of obligations undertaken on account of it (*Ex parte James*, 1 Deac. & C. 272; but see *Worrall v. Harford*, 8 Ves. 8; *Lawless v. Shaw*, 5 Cl. & Fin. 129). If a trustee agree to pay an accountant or manager at an extravagant rate, the Court will reduce the charge against the

Trustee is
entitled to be
indemnified
out of the
Trust Estate.

It is clear, however, that while the funds of the estate are liable, in the first instance, in security of the onerous obligations incurred by the trustee to third parties on behalf of his constituents, the trustee himself has a claim upon the surplus funds preferable to that of his constituents (*a*). In virtue of this equitable claim, the trustee may insist on his right of retention, in answer to a demand at the instance of the beneficiary for an unconditional surrender of the estate (*b*). The trustee would seem also to be entitled to obtain from the beneficiary an indemnity for current obligations undertaken in behalf of the trust as a condition of denuding (*c*).

Right of reten-
tion in security
transactions.

The preceding observations have reference to the case of trusts for the benefit of third parties. Where the object of the transaction is to create a security in favour of the trustee himself, the extent of his right depends upon the form of the conveyance. The different conditions were distinguished with great precision by Lord Fullerton in the leading case of *Robertson v. Duff* (*d*), and subsequent cases have added little to his conception of the rights of the trustee in security transactions. It may be sufficient for our purpose to say that, (1.) where the trust is constituted by an unqualified *ex facie* absolute disposition, or by an absolute disposition qualified only by a back-bond which is perfectly general in its tenor, the trustee has an effectual security both for prior and subsequent advances (*e*); (2.) that where the back-bond specifies particular obligations, but the language is not such as to restrict the security to these, the trustee may retain for subsequent advances (*f*); and (3.) that if the trust is defined, by a

estate to a reasonable amount (*Weiss v. Dill*, 3 My. & K. 26).

(*a*) Bell's Com. 851-2; *Cook & Paul v. Jeffrey*, 29 Nov. 1831, 10 S. 75, 1 W. & S. 767.

(*b*) *Wilson v. Mags. of Dunfermline*, 17 May 1822, 1 S. 455; *Fraser v. M'Naughten*, 21 Nov. 1829, 8 S. 104; *Barron v. National Bank of Scotland*, 28 Feb. 1852, 14 D. 565. See also *Sturgeon v. M'Lellan*, 20 Jan. 1813, F. C.; *Murray's Cred. v. Chalmer*, 1744, M. 2626; *E. of Bedford v. L. Balmerino*, 1662. M. 9155.

(*c*) *M'Growther v. Hill*, 2 Mar. 1822, 1 S. 371; Anonymous case, 21 Nov.

1829, 8 S. 103; *Innes v. Innes*, 18 Dec. 1828, 7 S. 206; *Carse v. Carse*, 1666, M. 16165; and see cases in next Chapter as to payment on caution, where the beneficiary's title is doubtful.

(*d*) *Robertson v. Duff*, 14 Jan. 1840, 2 D. 279; see pp. 291-2.

(*e*) *Brough v. Jollie*, 1793, M. 2585; *Leckie v. Leckie*, 21 Nov. 1854, 17 D. 81; *Walker v. Buchanan, Kennedy, & Co.*, 11 Dec. 1857, 20 D. 259; *M'Lelland v. Bank of Scotland*, 27 Feb. 1857, 19 D. 574.

(*f*) *Russell v. E. of Breadalbane*, 4 April 1831, 5 W. & S. 256, affg. 7 S. 767; *James v. Downie*, 15 Nov. 1836,

back-bond, or in *gremio* of the disposition, to be in security of particular debts, the trustee has no general right of retention either for past or subsequent advances (a).

By the 57th section of the Bankruptcy Act, it is enacted, that "No person shall, by merely lodging an oath and claim, or being ranked, or receiving payment of a dividend, or appearing or voting at a meeting in a sequestration as a creditor, be liable for any claim by the agent or other person employed by the trustee for money advanced, or expense incurred, or remuneration in relation to the affairs of the estate; reserving to the agent, or other person so employed, right to payment out of the estate, and from the trustee by whom he may have been employed, in so far as the same may be competent to him; and no trustee shall have relief in respect of such payment against such creditor, reserving to such trustee relief against the estate, and against those creditors or others who may on other grounds be liable in relief" (b).

Immunity of
Creditors
under Bank-
ruptcy Act.

It was decided in an old case, reported by Elchies (c), that creditors left out of a scheme of distribution for not acceding, could not be burdened with the expense of diligence for completing the trustee's right, or of ranking the creditors; but that the trustee was entitled to recover from them the common expense laid out for behoof of all the creditors. The right to burden creditors with the expenses of constituting the trustee's right seems to depend on whether they claim under the trust or in competition with it (d).

Liability of
Creditors
under Volun-
tary Trusts.

Parliamentary commissioners and trustees are not entitled to charge against the funds committed to their management the expense of an application to Parliament for a prolongation or extension of their powers (e). On this principle also interdict has been granted against railway directors applying funds of the shareholders towards the expense of an application to Parliament for additional powers (f). And where the magistrates of a burgh, who were trustees of a

Parliamentary
Commis-
sioners, etc.,
have no claim
against the
fund for ex-
penses not
authorized by
the Act of
Incorporation.

15 S. 12; *Maitland v. Cockerell*, 23 Nov. 1827, 6 S. 109.

(a) *Robertson v. Duff*, *supra*; and see cases on proof of trust, Chapter III. Section I., *passim*.

(b) 19 & 20 Vict. cap. 79, § 57.

(c) *Charteris v. Cred. of Merchiston*, 1734, Elch. Tr. No. 2.

(d) The principle is illustrated by the cases noted *infra*, p. 78.

(e) *Pet. Myles*, 13 Dec. 1855, 18 D. 205. And see Chapter XXI. Section I. (Powers of Trustees), where the English authorities are stated.

(f) *Brown v. Adam*, 19 Feb. 1848, 10 D. 744.

charitable foundation, had incurred expense in unsuccessfully promoting a bill to extend the operation of the charity, the Court granted interdict, at the instance of the truster's representatives, against the application of the funds for that purpose, although the minority, who disapproved of the bill, were willing that the account should be paid (*a*). However, trustees are entitled to the expense of opposing a bill before Parliament which is calculated to injure the estate, as this is a necessary part of the expense of administration (*b*).

A Trustee is not entitled to charge for professional services rendered by himself to the Trust; unless such employment is expressly sanctioned.

3. The doctrine is now firmly established, that trustees and judicial managers are not entitled to charge for professional services rendered to the trust, whether directly or indirectly through their partners in business, whether in the capacity of law agent (*c*), or of factor and cashier (*d*); unless the employment in the character of professional agent has been sanctioned by the beneficiaries (*e*), or by the terms of the settlement under which the trustees act (*f*). The disqualification is not applicable to tutors and curators *ad litem* (*g*); but this is the only exception. Accordingly, the offices of Parliamentary trustee (*h*), trustee for creditors (*i*), and judicial manager (including both factors and curators) (*k*), have been found by express decision to be offices of trust in the sense of the rule; so that persons holding these offices cannot accept remunerative employment under the trust.

(*a*) *Mackintosh's Trs. v. Mackintosh*, 30 June 1852, 14 D. 923.

(*b*) *Pet. Campbell*, 12 Jan. 1847, 9 D. 397.

(*c*) *Lord Gray v. Dundas*, 12 Nov. 1856—decided 21 June—19 D. 1; *Seton v. Dawson*, 18 Dec. 1841, 4 D. 319; *Broughton v. Broughton*, 5 De Gex, Macn. & G. 160; and see *Manson v. Baillie*, 19 June 1855, 2 Macq. 82, 91, overruling *Craddock v. Pyper*, 1 Macn. & G. 664; *Flowerdew's Trs.*, 22 Dec. 1854, 17 D. 263; *Morrison v. Rennie*, 26 Apr. 1849, 6 Bell, 422, revg. 9 D. 1483; and cases cited below.

(*d*) *Home v. Pringle*, 22 June 1841, 2 Rob. 384; *Wellwood's Trs. v. Hill*, 17 Dec. 1856, 19 D. 187; *Fegan v. Thomson*, 20 July 1855, 17 D. 1146; *Bon Accord Marine Ins. Co. v. Souter's Trs.*, 13 June 1850, 12 D. 1010.

(*e*) *Miller's Trs. v. Miller*, 23 Feb.

1848, 10 D. 767, last point; *Ommanney v. Smith*, 3 Mar. 1854, 16 D. 721; but see *Fegan v. Thomson*, 20 July 1855, 17 D. 1146, and *Lauder v. Miller*, *infra*.

(*f*) *Goodsir v. Carruthers*, 19 June 1858, 20 D. 1141; *Craddock v. Pyper*, *supra*; *Learmonth v. Paterson*, 13 Feb. 1858, 20 D. 564; *Findlay's Trs. v. M'Omie*, 6 Mar. 1852, 14 D. 621.

(*g*) *Pirrie v. Collie*, 4 Mar. 1851, 13 D. 841; *Pet. Rennie*, 27 June 1849, 11 D. 1201.

(*h*) *Lord Gray v. Dundas*, *supra*.

(*i*) *Lauder v. Miller*, 15 July 1859, 21 D. 1353; *Johnston's Cr. v. Johnston's Tr.*, 1738; see 21 D. 1383.

(*k*) *Kennedy v. Rutherglen*, 25 Jan. 1860, 22 D. 567; *Baillie and Douglas' cases*, 19 D. 1; *Rennie and Flowerdew*, *supra*.

In a case where trustees were empowered to appoint factors and agents of their own number, and to allow the factor "a reasonable gratification for his trouble," and the trustees had appointed one of their number factor, with a commission of 5 per cent., the Court, on an objection being taken by the beneficiaries to the amount of the commission, restricted it to $2\frac{1}{2}$ per cent. (a).

The case of *Hay v. Hay's Trustees*, pending in the Second Division (b), raises the question, whether trustees empowered to carry on the truster's business are entitled to make profit out of the business. In this case one of the trustees was assumed as a partner in his individual capacity, on the footing that a certain amount of capital was to be advanced to him, which was to be repaid out of the share of profits falling to him as partner. Although the point is not decided, we may observe, that unless partnership contracts are to be made an exception from the general rule, which prohibits trustees from entering into any remunerative contract with the trust estate, the assumption of a trustee as a partner cannot be supported. It is another question whether the partner might not be allowed some compensation for his trouble, on the ground that his *whole* time had been given to the service of the trust. The argument *ad misericordiam* in such a case is very strong (c).

"Reasonable gratification."

Whether a Trustee can claim remuneration for his services in carrying on the Truster's business.

(a) *Thomson's Trs. v. Robb*, 9 July 1851, 13 D. 1826. The principle is more fully explained in Chapter XII. Section I., *supra*, pp. 219, 220.

(b) June 1862. If the case is decided before the date of publication, it will be cited in the Appendix.

(c) In *Brocksope v. Barnes*, 5 Madd. 90, where a testator had directed certain business to be carried on by his trustees and executors, a petition was presented to the Court of Chancery by one of the executors, to ascertain what ought to be allowed him as compensation for his trouble. Sir John Leach, V.-C., held that while the trustee was entitled to all reasonable expenses incurred in the conduct of the trust, there was nothing in the circumstances to take the case out of the general rule, that a trustee is not entitled to compensation for personal trouble and loss

of time. The leading English case on this point is *Robinson v. Pett*, 3 P. Wms. 132; and see Wh. & T. Leading Ca. II. 206. See also *Burden v. Burden*, 1 V. & B. 170; *Stocken v. Dawson*, 6 Beav. 371.

It is impossible, within the limits of a note, to attempt even an abstract of the English decisions on the subject of allowances to trustees. We shall, therefore, notice only such of the decisions as bear upon the less known or settled points in our law. The general rule is, that remuneration cannot be claimed by a trustee who acts as solicitor to the trust (*New v. Jones*, 1 Hall & T. 632; *Christopher v. White*, 10 Beav. 523, etc.), solicitor in bankruptcy (*ex parte Newton*, 3 De G. & Sm. 584), factor (*Scattergood v. Harrison*, Mos. 128), or auctioneer (*Kirkman v. Booth*, 11 Beav. 273; *Mathieson*

Whether a legacy to Trustees is conditional on acceptance of office.

If a legacy is given to trustees expressly as a recompense for their trouble, they cannot claim it unless they accept. But if the legacy is not expressed to be in consideration of their services, the presumption is that it is a gift, and not conditional upon acceptance (a).

v. *Clarke*, 3 Drew, 3). Under the general expression *trustee* are included mortgagees (*Mathieson's case*, *supra*, and *Sclater v. Cottam*, 3 Jur. 630, where a mortgagee who had acted as his own solicitor, was only allowed costs out of pocket as against a second mortgagee), directors (*York & N. Midland Ry. Co. v. Hudson*, 16 Beav. 485, 500), and joint owners (*Smith v. Lay*, 3 K. & J. 105, *sed quære*). But a person who is merely a constructive trustee, e.g., a surviving partner who continues to manage a business for the family without having been authorized to act as trustee,—although he must account for the profits earned with his constituents' money, is entitled, in addition to his share of profits on his own capital, to an allowance for his management of the business (*Brown v. De Tastet*, Jac. 284, decided by Lord Eldon; and cases in Wh. and T., II. 223-4).

Even in the case of express trusts, it has been held that where work is done by a trustee which could not have been so well done by any other person, he may have a claim to recompense. For example, in *Bainbrigge v. Blair* (8 Beav. 595, 14 L. J. 405), where a solicitor and trustee had acted as agent to the trust, and devoted a large share of his time to the arrangement of certain lawsuits and other family matters with which he was peculiarly conversant, it was observed by Lord Langdale, M. R., founding on the case of *Marshall v. Holloway*, 2 Sw. 453, that though he could not give compensation under a summary application, yet if the application had been timeously and competently made, the trustee might have had an allowance, not in the shape

of professional remuneration, but as a recompense for trouble in addition to his outlay. The judgment in *Cradock v. Piper*, 1 Mac. & G. 664, if it is to be regarded as of any authority, must be referred to the same principle.

The rule may be excluded by an express contract for remuneration with the *cestui que trust*; but the decisions show that the Court will construe such agreements very strictly, and will, if possible, assume that the parties contemplated payment for outlay, and not for trouble or professional services. Such, accordingly, was the construction put in *Moore v. Frowde*, 3 My. & Cr. 45, 6 L. J. Ch. 372, on a clause in a trust deed which provided, (1) that all the expenses, disbursements, and charges, already or thereafter to be incurred, sustained, or borne by the trustees, etc., should be paid in the first place out of the produce of sales of the estate; and (2) that the trustees should, out of the trust monies, reimburse themselves for all such reasonable costs, charges, and expenses as they should or might sustain, expend, or be put unto, in or about the execution of all or any of the trusts thereby in them reposed, such costs, charges, and expenses to be reckoned, paid, and stated as between attorney and client. "This last provision," said Lord Cottenham, "does no more than the rule of law would have done—a trustee's costs being taxed as between attorney and client. And what are the costs so to be taxed? Costs which the trustee may sustain or be put to—terms wholly inapplicable to sums claimed as remuneration" (6 L. J. Ch. 374).

(a) See the cases commented on, Vol. I. p. 258.

As a general rule, trust expenses of whatever nature are a burden on the residuary estate, though in exceptional circumstances they may form a charge against special legacies, or even on legacies of quantity. On this point we refer to the Chapter on Legacies (a).

Expenses of trust are a burden on residue.

SECTION II.

LIABILITY FOR EXPENSES OF LITIGATION.

Subject to certain exceptions, which we shall afterwards notice, a trustee is generally liable to creditors for any expense which may be occasioned by opposition on his part to their just demands (b). That the enforcement of this principle entails no hardship to the trustee, is apparent from this simple consideration, that the trustee is not bound to go on with the litigation after the funds available for defending the action are exhausted. As a mere question of prudence, a trustee would not be justified in exhausting the estate by litigation without the sanction of the beneficiaries; and, in justice to himself, he may require from them a guarantee in security of his right to indemnity. Besides, it is the fault of the trustee if he ever puts himself in the position of an active litigant. His natural attitude is that of neutrality. In the prospect of serious litigation in regard to claims upon the trust funds, the resource is always open to him of raising an action of distribution, where he appears simply as a stakeholder, and in which the expenses of his formal appearance form a first preferable charge upon the fund *in medio*.

Trustees, as a rule, are liable for the expenses of litigation.

Trustee may require a guarantee from constituent.

Not bound to engage as an active litigant.

Prior to the recent change in the law with respect to the resignation of trusteeship, a trustee might, however, have been placed in a somewhat embarrassing position, in the event of the trust estate embracing unsettled claims which he might consider himself under an obligation to realize, but which could only be recovered by legal process involving liability for expenses. Even in that case, the

Trustee may escape from prospective liability by resigning.

(a) Chap. XXXVI. Sect. 3.

(b) *Raeburn v. Dawson*, 14 June 1831, 9 S. 728; *Clyne's Trs. v. Alison*, 8 Feb. 1840, 2 D. 554; *Gibson v. Wilkie*, 25 May 1833, 11 S. 656; *Wylie v. Smith*,

15 Nov. 1834, 13 S. 40; *Sandeman v. Shepherd*, 4 July 1835, 13 S. 1037; *Robertson v. Morrison*, 4 Dec. 1823, 2 S. 553; *Welsh v. M^rArthur*, 15 June 1826, 4 S. 710; and other cases *infra*.

trustee has still the resource, that he is entitled to demand security from his constituents for the contingent expenses before going on with the proceedings. It is clear, at all events, that beneficiaries refusing to indemnify the trustee in such circumstances would be effectually shut out from any ground of complaint against him in consequence of his refusing to carry on the litigation at his own personal risk. Under the provisions of the Trustee Act (a) the trustee has now open to him as a last resource the power of resignation, by the exercise of which he is enabled to devolve the administration upon the Court, who will instruct their factor as to the course he ought to pursue with respect to litigation, and shield him from personal liability for obedience to their behests.

Trustee may protect the interests of Minors through the intervention of a Curator *ad litem*.

It may be asked by what means trustees charged with the protection of the interests of minors may be enabled to protect themselves from liability for the expenses of litigation, observing that a minor has not the capacity to enter into an arrangement for the indemnity of his guardians. The answer is obvious. If the minor is in the position of a claimant, the trustees have only to apply for the appointment of a curator *ad litem* for his interest, and, after the appointment is made, to advance such interim payments out of the trust estate as the Court may think proper to allow for the prosecution of his claim. This was the course recommended by the Court in a case where trustees, under circumstances admittedly of great hardship, were found personally liable for the expenses of a suit in which they appeared as defenders (b). The trustees were custodiers of an alimentary fund secured by marriage-contract to the wife for her alimentary liferent, and to the children in fee; and although they were successful in defending the estate against a most vexatious attempt on the part of the husband (a bankrupt), suing with concurrence of his wife, to obtain possession of the fund, they were condemned in the meantime to bear the expenses of their defence, on the ground that these did not form a proper charge against the alimentary interest. It was observed by the Court, that the trustees might have avoided personal liability by making application to the Court for the appointment of a curator *ad litem* to the wife and children, which, when an alimentary

(a) 24 & 25 Vict. cap. 84.

1849, 11 D. 457; *Graham v. Marshall*,

(b) *Robertson v. Morrison*, 27 Jan.

22 Nov. 1860, 23 D. 44.

fund was at stake, their Lordships would not have hesitated to grant (a).

In the further elucidation of this subject, we shall distinguish between the cases on (1) expenses arising out of litigation with third parties not connected with the trust, and (2) expenses incurred in litigating with parties claiming under the settlement.

Division of
Section.

I. *Expenses of Litigation with Parties not interested in maintaining the Trust.*

We are now to notice a few of the cases which, from their importance or their exceptional character, illustrate the general proposition, that trustees are personally liable for expenses in questions with creditors of the estate, or parties disputing the validity of the trust. In the comparatively early case of *Raeburn v. Dawson* (b), trustees under a voluntary trust were, by a unanimous decision of the First Division, held personally liable for the expenses caused by their opposition to an action at the instance of a creditor in a building contract, in which they stated counter claims on the part of their constituent, and also claimed the right to retain the amount of their own outlay for the completion of the contract. In *Jackson's Trs. v. Black* (c), trustees were held liable to a creditor for the expense occasioned by their opposing decree of constitution in an action at his instance.

Liability to
Creditors for
expenses illus-
trated.

In a more recent case (d), where testamentary trustees raised action against a firm, of which the testator had been a partner, for payment of a bill for L.200 granted to the testator, and were met by a counter action of count and reckoning as to the testator's intromissions with the effects of the company, which resulted in decree being pronounced against the trustees, as his representatives,

*Kirkland v.
Crighton.*

(a) 11 D. 459. In *Fraser v. Pattie and Tutor ad litem*, it was expressly laid down that the Court could give no decree for expenses against a tutor *ad litem*, Lord Mackenzie observing that they might as well be asked to find the counsel liable (9 Mar. 1847, 9 D. 903). See also *Johnston v. Beattie*, 29 Jan. 1856, 18 D. 343; and *Forbes v. Morrison*, 8 June 1844, 6 D. 1113, where a charge against a curator *bonis* for

the expenses of litigation was suspended without caution.

(b) *Raeburn v. Dawson*, 14 June 1831, 9 S. 728. But see *Dickson v. Bonar's Trs.*, 20 Nov. 1829, 8 S. 99.

(c) *Jackson's Trs. v. Black*, 31 May 1832, 10 S. 597; *Melville v. Lady Preston*, 26 June 1841, 8 D. 1101.

(d) *Kirkland v. Crighton*, 3 Feb. 1842, 4 D. 613. See also *Home's Trs. v. Ralston*, 13 June 1834, 12 S. 721.

for a sum of upwards of L.600, the Second Division recalled an interlocutor which had been pronounced in the Sheriff Court, finding the trustees personally liable for the expenses. It is to be observed, that in this case the position of the trustor, as a partner in the litigating company, rendered an accounting necessary, and that the litigation was forced upon the trustees by the course which the pursuers adopted of raising an action of accounting, instead of proposing an extrajudicial settlement. In this view of the case, Lord Moncreiff observed, "Were not the trustees in *bona fide* in believing that no such claim as that in the count and reckoning was to be made? The accounting followed the action for the L.200, and the trustees were forced into it. They had no ground for supposing that they would be involved in a count and reckoning. It was their duty to make the claim for the L.200, which was met by the count and reckoning; and, in the circumstances, I think it would be extreme severity against the trustees to say that they were to be personally answerable."

Exhaustion of
Trust Estate
not pleadable
in answer to
Creditors.

It has frequently been pleaded on behalf of trustees, in reclaiming against a judgment finding them personally liable for expenses, that they ought not to be subjected in personal liability to the creditor because the trust estate was exhausted, and that there were no funds out of which they could reimburse themselves. In some of the earlier cases, an inquiry was permitted as to the fact of the trustees being in possession of funds (a). But the existence of trust funds is now held to be immaterial; and the inconvenience to the trustee of having to pay the expenses is just as little considered, because expenses are not awarded as in the nature of penalty, but as compensation to the successful party for the cost to which he has been put in establishing a right which his opponents ought to have known to be well founded (b). Trustees, moreover, are subject to the same incidental rules with respect to expenses of process and the conduct of litigation as other litigants. Execution, pending appeal, will be issued against them in ordinary course (c). A trustee who is in the position of an undischarged bankrupt may be compelled to find

(a) See *Gordon's Trs. v. Stewart*, 25 Jan. 1822, 1 S. 271; *Grant v. Gibson-Craig*, 30 May 1829, 7 S. 686.

(b) *Clyne's Trs. v. Alison*, 8 Feb. 1840, 2 D. 554; *Gibson v. Wilkie*, 25

May 1833, 11 S. 656; *Wylie v. Smith*, 15 Nov. 1834, 13 S. 40; *Sandeman v. Shepherd*, 4 July 1835, 13 S. 1037.

(c) *Robertson v. Morrison*, 4 Dec. 1823, 2 S. 553.

caution for expenses (a). And a trustee who furnishes the means of prosecuting an action in the name of his constituent may be decerned against for expenses *qua dominus litis* (b).

Although, as we have seen in the previous chapter, an action directed against parties *as trustees* will not authorize a personal decerniture (c), and still less the execution of personal diligence against members of the trust (d), a different rule has been sanctioned in regard to decernitures for expenses. In *White v. Wilson and Co.* (e), the Court, in a suspension of a charge against the individual trustee, without expressly deciding the general question, found "that the chargers are entitled to payment of the sums charged for out of any funds which are or ought to be in the hands of the suspender as trustee." But in the subsequent case of *Kay v. Wilson's Trs.* (f), the testamentary representatives of a truster were decerned against personally for the expenses occasioned by their defending an action for L.1000 of damages for seduction, committed by their constituent, in which a verdict was given for L.10, although they pleaded exemption on the ground that they were only concluded against as trustees; that the trust estate was insufficient to meet the expenses; and that they were bound in duty to resist a claim which was so greatly in excess of the sum actually found to be due. It would appear, however, that a judicial factor (who, as an officer of Court, acting under the authority of the Court, stands in a less responsible position towards creditors) cannot be made personally liable for the expenses of an action directed against him in his official capacity (g).

Personal decerniture for expenses may be pronounced in an action against Trustees collectively.

The reports for the period of the last twenty years furnish a considerable number of cases upon the question of the liability of trustees in bankruptcy for the expenses of legal proceedings to which the trustees had sisted themselves as parties. It appears to have been considered at one time, that although a trustee sisting

Liability of Trustees in Bankruptcy for expenses.

(a) *Richmond v. Railton's Tr.*, 13 June 1850, 12 D. 1017.

(b) *Welsh v. M'Arthur*, 15 June 1826, 4 S. 710; *Fleming v. Little*, 2 Dec. 1829, 8 S. 172.

(c) *Ross v. Heriot's Hospital*, 5 Bell, 37.

(d) *Gordon v. Campbell*, 13 June 1842, 1 Bell, 428.

(e) *White v. Wilson and Co.*, 2 Mar. 1843, 5 D. 763.

(f) *Kay v. Wilson's Trs.*, 6 Mar. 1850, 12 D. 845.

(g) *Ferguson v. Murray*, 20 Dec. 1853, 16 D. 260.

himself in a depending process might be liable for subsequent expenses, yet, that as to expenses already incurred, the contradictor stood in the position of an ordinary creditor, and was therefore only entitled to rank for a dividend (a). It is unnecessary, however, to enter into detail on this point, as it has since been fixed by a judgment of the whole Court (b), that the successful party is entitled to payment of the whole of his expenses from the trustee, leaving the latter to obtain relief from the estate, if he can, by entering the disbursement as an item of discharge in his accounts.

Locus penitentis where Trustee merely sists himself to make inquiry.

However, in the subsequent case of *Muir v. The Tay Insurance Co.* (c), it was held that a trustee upon the sequestrated estate of a bankrupt who had merely sisted himself, and, after attending an examination of havers, abandoned the action, had not so completely adopted the suit as to subject himself to liability for expenses incurred before the sequestration; but that the previous expenses formed a claim against the bankrupt and the sequestrated estate only.

Trustees cannot sist themselves on condition of not being liable for expenses.

Trustees cannot avoid universal liability for the expenses of process by proposing to sist under condition that they shall not be liable for expenses incurred prior to their appearance. It has been expressly decided that trustees, if they compare at all, must be sisted unconditionally (d).

Trustee not liable for his constituent's expenses.

On the other hand, a trustee for creditors is not liable for the expenses previously incurred by the bankrupt's own agent. He may even uplift a consigned fund without deduction, and the agent can only rank for a dividend (e).

(a) Compare *Kidd v. Brown*, 17 May 1828, 6 S. 825; *Grant v. Gibson-Craig*, 30 May 1829, 7 S. 686; and *Sandeman v. Shepherd*, 4 July 1835, 13 S. 1037; with *Cullen v. Fontaine*, 27 May 1831, 9 S. 637; and *Gibson v. Wilkie*, 25 May 1833, 11 S. 656.

(b) *Torbet v. Borthwick*, 23 Feb. 1849, 11 D. 694; *Morrison v. Dundas*, 11 July 1809, F. C.; *Paterson v. M'Lelland*, *infra*; *Scott v. Pattison*, 21 Dec. 1826, 5 S. 172.

(c) *Muir v. Tay Insurance Co.*, 14 Feb. 1843, 5 D. 579. It has been observed, that in decerning against a

trustee for expenses of process (where it is meant that he shall himself be liable if there are not sufficient trust funds), the proper form is to decern against him personally, and not as trustee. *Davidson's Trs. v. Carr*, 21 June 1850, 12 D. 1069.

(d) *Buchanan v. Corbet, Borthwick, & Co.*, 15 June 1827, 5 S. 805; *Sandeman v. Shepherd, etc.*, 4 July 1835, 13 S. 1037.

(e) *Peddie v. Davidson*, 17 July 1856, 18 D. 1306. See *contra*, *Paterson v. M'Lelland*, 4 June 1824, 3 S. 103.

We have still to notice a class of actions, very important as regards the liability of the trustees, on account of the enormous expense attending them,—we refer to actions of reduction of trust settlements. The effect of reduction being to destroy the title of the alleged trustees of the settlement altogether, it follows that trustees defending a reduction could have no privilege in respect of their title as such, had the law been even less settled than it is in regard to the liability of trustees to persons *not claiming under the settlement*. Accordingly, in the latest case in which the question was raised (*a*), it was ruled by a unanimous judgment of the Second Division, affirming Lord Kinloch's interlocutor, that trustees representing the interests of a married lady as liferenter and her children as fiars, were liable, in consequence of unsuccessfully defending a reduction of a trust assignation, to account for the fund which was the subject of competition, without any deduction for the expenses of the action. The Lord Justice-Clerk (*b*) observed, that the argument that trustees were entitled to indemnity for the expense of defending an invalid disposition in their favour, was an entire perversion of the ordinary rule, that trustees are entitled to be relieved from expenses incurred in defending the trust estate, or the trust deed. That the unsuccessful parties were called trustees, did not affect the question; because there were other parties whose interests had been affected by the trust assignation, and it was impossible, after they had successfully resisted the enforcement of that assignation, to hold that they ought to pay the expenses of the parties who had attempted to deprive them of their rights. The interests of minors were sufficiently protected by leaving their defence to their legal guardians, or, if necessary, by applying for the appointment of a tutor *ad litem*. "If," said his Lordship, in conclusion, "trustees do not see that they are in safety to defend an action, it is quite competent, and not unusual, that they should appeal to the parties and say, 'Do you wish us to defend this action? because, if you do, you must furnish us with funds.' And nothing could be fairer than that the trustees should have so addressed Mr M. and his wife, who adequately represent all these parties; and if

Expenses in Reductions of Trust Settlements.

Trustees are liable for maintaining a reducible deed.

Graham v. Marshall.

(*a*) *Graham v. Marshall*, 22 Nov. 1860, 23 D. 41; cases of *Chalmers*, *Kirkpatrick*, and *Morrison*, *infra*; but see the cases in the note at the end of the chapter.

(*b*) Lord Glencorse, 23 D. 43.

they declined to assist the trustees, then the trustees were quite entitled to allow decree in absence to go out, and I cannot see that any after liability could attach to them."

Chalmers v. Scott.

This decision is in accordance with the principle established in *Chalmers v. Scott* (a), where trustees under a disposition in trust for the establishment of a charity respecting which there had been a considerable amount of litigation, and which was ultimately reduced by the granter as not being his deed, were found personally liable for the expenses of the litigation. This was certainly a case of hardship, because there were no beneficiaries from whom an indemnity could have been obtained, and there were strong grounds for contending that the ostensible granter of the deed ought to have been made to bear the expense of reinstating himself in his title to the property. However, the trustees were not necessitated to defend; and in the circumstances they ought to have declined the trust, and petitioned for the appointment of a judicial factor.

Reduction *ex capite lecti*.

Even in a case of reduction *ex capite lecti*, where the validity of the conveyance could not be determined without a trial, the trustees were found liable by the First Division to account for the whole fund, without deduction of their own expenses, although the Court, moved by the remonstrances of Lord Mackenzie, altered the interlocutor of the Lord Ordinary in so far as it found the trustees liable to the pursuer for the expenses incurred *by him* (b). There does not appear to be any precedent for condemning trustees to pay the expenses on both sides in cases similar to those under consideration.

If part of a multiform settlement is reduced, Trustees are not liable.

When trustees become parties to an action with the object of defending the truster's settlements as a whole, it would appear, although the question is not free from doubt (c), that they are entitled to their expenses, notwithstanding that *one* of the instruments upon which their title is founded is set aside or held to be inoperative.

II. *Expenses in Litigation with Parties claiming under the Settlement.*

Trustee is entitled to the expenses of raising an Action of Distribution;

As trustees are entitled to be indemnified by the parties beneficially interested for the necessary expenses attendant upon the

(a) *Chalmers v. Scott*, 23 June 1830, 8 S. 961. See *Kirkpatrick v. Irvine*, 18 June 1848, 10 D. 367.

(c) Compare *Stainton v. Stainton*, 17 Jan. 1828, 6 S. 363, with *Graham v. Marshall*, 22 Nov. 1860, 23 D. 41.

(b) *Morrison v. Morrison's Trs.*, 23 Dec. 1848, 11 D. 297.

execution of the trust, it follows that, in the discussion of questions as to the relative interests of those parties, trustees do not, as a general rule, incur liability for the expense of bringing the case into Court. To understand the distinctions that have been taken in exceptional cases, it is necessary that we should distinguish between the position of a trustee who appears as holder of a fund, or for his own exoneration, and that of a trustee following out proceedings as an active defender.

but not if he interferes as an active litigant.

In the former class of cases, the rule is that a trustee is not only not liable to successful claimants, but that he is entitled to retain out of the funds in his hands his expenses as raiser, as well as those incurred in obtaining his discharge (a).

Raiser's expenses.

However, if an action of exoneration is rendered necessary, in consequence, not of any unreasonable refusal on the part of the beneficiaries to acquiesce in an extrajudicial settlement, but by reason of the fault of the trustee himself—as, for instance, in neglecting the duties of his office, whereby the trust estate has been injured (b), or its affairs have fallen into confusion (c)—the trustee must bear the cost of his own exoneration, including, if necessary, the expense of a judicial accounting. On this principle also, where a trustee had gone to reside in England, leaving the trust papers in the hands of a co-trustee and beneficiary, and for several years took no part in the administration of the trust, and made no attempt to obtain authority to resign his office, the Court, while granting the prayer of a petition at his instance for recovery of the trust papers, refused to give him the expenses of the application out of the trust estate (d). And where a trustee, instead of raising an action in his own name for distribution and exoneration, joined a beneficiary as an active litigant in a process of count and reckoning against his co-trustee, which was afterwards withdrawn, the Court

Trustee not entitled to expenses if litigation be the result of his own fault.

(a) *Neilson's Trs. v. Peacock*, 14 Dec. 1822, 2 S. 89; *Cumming v. Hay*, 28 Feb. 1834, 12 S. 508; *Taylor v. Noble*, 24 May 1836, 14 S. 817; *Dunbar v. Sinclair*, 14 Nov. 1850, 13 D. 54; *Kirkland v. Crighton*, 3 Feb. 1842, 4 D. 613. See the ensuing chapter on the Discharge of Trustees, where the subject of judicial exoneration is more fully discussed.

(b) See the cases on Liability in the preceding chapter.

(c) *Hill v. Hill*, 15 Jan. 1856, 18 D. 316; *Kerr's Trs. v. Moody*, 19 June 1850, 12 D. 1041. The party found liable was a judicial factor, but the principle is the same in both cases.

(d) *Hill v. Hill*, *supra*. See *Nicol v. Cameron*, 19 June 1829, 7 S. 777.

refused to award him the expenses of a subsequent action in his own name, for the purpose of distribution and exoneration (*a*).

Expense of resistance to a successful claim not a charge against that claim.

As it would be contrary to equity that the share of a succession falling to an individual legatee should be absorbed or diminished by the expense to which he has been necessarily put in asserting his right, it follows that trustees resisting a claim in a multiplepointing are not entitled to charge their expenses against the individual legatee (*b*). We have already said, that it is no part of the duty of a trustee to interfere in a question of competition between beneficiaries. In so doing, he will probably involve himself in personal liability to the claimants (*c*); though, if he litigate in good faith, having no personal interest in the result of the competition, he may perhaps be allowed his expenses out of the estate (*d*).

Expenses of necessary litigation in a Foreign Court.

Trustees or guardians entering into litigation in a foreign Court, in defence of the powers with which they have been invested, agreeably to the law of their own country, for the protection of the personal property of a minor, are entitled to claim their expenses out of the minor's estate (*e*).

Liability of Legatees for expenses.

The general proposition, that the trustee's expenses in an action for distribution and exoneration form a charge against the trust estate, implies, of course, that if the residuary estate be insufficient to meet the expense, it must be defrayed by the legatees in rateable proportion (*f*).

Expenses of Trustees in competitions between Creditors.

The claims of competing creditors under a voluntary trust fall to be dealt with on the same footing as those of beneficiaries under a gratuitous settlement. Accordingly, the trustee's expenses for *bona fide* opposition to a preferable claim form a charge against the

(*a*) *Fotheringham v. Saltoun*, 3 Feb. 1852, 14 D. 427. See also *Smith v. Telford*, 29 June 1838, 16 S. 1223, where it was laid down by Lord Fullerton, that trustees are liable to the beneficiaries if they, *from over-scrupulousness or obstinacy*, engage in litigation, occasioning great and unnecessary expense, which it would be unjust to impose on those holding the beneficial interest in the trust.

(*b*) *Cameron v. Anderson*, *infra*; *Murray v. Johnston*, 24 Mar. 1831, 9 S. 631. As to the right of the bene-

ficiary to claim his expenses, see Chapter XXIX., Beneficiary's Right of Action.

(*c*) *Murray v. Johnston*, *supra*.

(*d*) *Cameron v. Anderson*, 12 Nov. 1844, 7 D. 92.

(*e*) *Johnston v. Beattie*, 29 Jan. 1856, 18 D. 343; *Stuart v. Stuart* (Marquis of Bute's case), 17 May 1861, 4 Macq. 1; and see *Stewart v. Campbell*, 12 Feb. 1830, 8 S. 512.

(*f*) *Cameron v. Anderson*, 12 Nov. 1844, 7 D. 92.

estate, though not against the successful competitor (a). If there are no surplus funds available, the trustee will not be personally liable for the claimant's expenses, unless he has acted in collusion with the bankrupt, or been guilty of professional impropriety (b). In virtue of his right to indemnity, he is entitled, even in a question with a preferable creditor, to retain the amount of his expenses necessarily or profitably incurred in the administration of the trust (c).

(a) *Carsewell v. Munn's Trs.*, 21 June 1832, 10 S. 677; *Cleghorn v. Gordon*, 16 Jan. 1827, 5 S. 203. In connection with the claims of creditors, we may direct attention to the important question, whether a trustee in bankruptcy, requiring and obtaining delivery of the bankrupt's title deeds from his agent (subject to his lien), incurs personal liability to the agent. The true principle seems to be that if the trustee has, on behalf of the estate, taken benefit by the delivery of the titles, he is bound to give effect to the lien, and is liable for neglecting to do so on the principles explained, *supra*, II., 30. See *Rennie & Webster v. Myles*, 8 Feb. 1847, 9 D. 619; and the authorities cited in Lord Cunninghame's Note.

(b) *Schuermans v. Goldie*, 7 Mar. 1829, 7 S. 559. See *Cabbel v. Miller's Tr.*, 8 July 1828, 6 S. 1101; *Bell v. Wright*, 19 Nov. 1842, 5 D. 162.

(c) With respect to the expenses of competitions among beneficiaries, the later practice is to award expenses against the unsuccessful party in a multiplepounding, just as in any other suit; and this is just, because there is no reason why a party claiming a fund to which he is not entitled should be provided with the means of doing so at the expense of his opponent. The cases in which it appears from the re-

ports that the expenses of competitions have been allowed out of the trust estate, are of no value as precedents, unless it, the report, also states that the liability of the estate for expenses was disputed; for such interlocutory findings as to expenses are frequently pronounced on the authority of a statement at the bar, that the parties had agreed to lay the joint expense of the discussion upon the estate. The grounds upon which expenses have been allowed out of trust estates to the unsuccessful parties are, that the deed is challengeable upon some general ground, such as uncertainty in the object, which could not be determined without recourse to judicial proceedings (*Miller v. Black's Trs.*, 14 July 1837, 2 S. & M'L. 866); or that the provisions of the settlement are ambiguous, and that a litigation was necessary to secure the title of the successful party (*Ramsay's Trs. v. Ramsay*, 12 Feb. 1836, 14 S. 472; *Duguid v. Dundas*, 8 Feb. 1839, 1 D. 473; *Grieve's Trs. v. Bethune*, 9 June 1830, 8 S. 896). In *Morrison's Trs. v. Nisbet* (30 June 1829, 7 S. 810), the pursuer, in a reduction of a settlement on the ground of an error in the testing clause, was found entitled to his expenses out of the estate; but this decision would not now be followed as a precedent.

CHAPTER XXVI.

OF THE EXTINCTION OF THE TRUST AND DISCHARGE OF THE TRUSTEES.

Duty of distribution after fulfilment of trust purposes;

but not while purposes are unfulfilled.

Trustee must take care to protect contingent interests.

IT is equally the duty and the right of the trustee, after all the temporary purposes of the trust have been fulfilled, to make a final distribution of the remaining estate, and to discharge himself of the burden of the trust, by conveying or paying over the residue to the truster, if alive, or if otherwise to the heirs or disponees of the equitable interest. As a general rule, a trustee cannot be compelled to denude of his office while there are trust purposes remaining unfulfilled (a). His duty as protector of the settlement requires, in most cases, and more especially if there are minor beneficiaries, that he should retain a certain control over the trust property,—a duty which cannot be discharged by investing the funds in the names of those who are beneficially interested in the succession.

Suppose, for instance, that the destination is to a plurality of persons with right of survivorship, or to parties successively substituted to the succession, it is clear that in such a case the trust must be kept up for the protection of the contingent interests. By investing the funds in the name of the institute, subject to the terms of the destination, the trustee would put it in the power of the institute to commit a breach of trust. The destination over would not prevent him from giving a good title to a purchaser. Again, if there are annuities or liferent interests charged upon the general succession, the trustee is entitled, and it will be his duty, unless the consent of the annuitants is obtained to a different arrangement (b), to retain a capital sum in his hands yielding a sufficient return to

(a) See, however, *Stainton v. Stainton's Trs.*, 25 Jan. 1850, 12 D. 572.

(b) *L'Amy v. Nicolson's Trs.*, 5 Dec. 1850, 13 D. 240; *Hume v. Stewart*, 26 Nov. 1834, 13 S. 90.

meet the expense of the annual burdens, leaving a margin to cover depreciation or abatement of interest. Annuitants are not obliged, for example, to accept annuities purchased from an insurance company; for they are entitled to the security of a legal investment in the funds, or on heritable security (a). However, trustees are not entitled to deprive the fiar of his enjoyment of the estate on the ground that it is subject to the burden of annuities; for the interest of the annuitant is sufficiently secured by setting apart a fund adequate to yield the required annual payment (b). In a subsequent chapter, we shall consider the question, whether trustees are entitled to encroach upon capital to satisfy annuities (c).

Again, it is incumbent on trustees to satisfy themselves, before denuding of the estate, that the parties to whom they make payment are entitled to it (d). If, through any misapprehension on their part, the trust funds are distributed in a manner not authorized by the provisions of the settlement, the loss must fall upon the trustees, unless the heirs of the settlement were aware of their rights and acquiesced in the distribution (e). As trustees cannot be expected to incur any risk, they are entitled, and it is their duty, in all cases of doubtful construction, to seek the authority of the Court for the proposed distribution, in an action of multiplepoinding and exoneration. A bond of indemnity may secure to the trustees their relief against the party to whom payment has been erroneously made, but it will not relieve them from liability to account, in the first instance, to the party truly entitled. Where an indemnity has not been asked, it is doubtful whether the trustees have any recourse against a party to whom payment of a gratuitous provision has been made in consequence of error in law. In the

Trustee is responsible for denuding in favour of the proper party.

Bond of Indemnity.

(a) *Scheniman v Willison's Trs.*, 3 July 1832, 10 S. 759; *Forsyth v. Kilgour*, 15 Dec. 1854, 17 D. 208; *Davidson v. Dobie*, 13 Feb. 1828, 6 S. 536. See *Burrell v. Delevante*, 31 L. J. Ch. 365, and cases there cited.

(b) *Watt v. Greenfield's Trs.*, 18 Feb. 1825, 3 S. 544.

(c) Chapter XXXVI. Section 3.

(d) It is scarcely necessary to allude in this place to the hazard to which trustees may be exposed in consequence of their ignorance of the prin-

ciples of the law of vesting. These principles are now beginning to be better understood; and we may even look forward to the advent of a time when trustees of a settlement which provides for contingent interests may be enabled to wind up without seeking for judicial exoneration.

(e) As to the effect to be given to the plea of acquiescence, see Chapter XXIX. The question of the trustees' liability has been already discussed. Chap. XXIV. Section 1.

case of payment to a creditor in excess of the free funds, trustees have certainly no relief; for, as the whole debt was *ex hypothesi* due by the truster, there is no equity between the creditor and the truster's representatives entitling the latter to claim repetition (a).

Duty of Trustees in cases of uncertainty as to whether a Legatee is in life.

A frequent source of uncertainty as to the parties who are beneficially entitled to a succession, is the disappearance or long-continued absence of legatees, giving rise to questions depending upon the presumption of life, either as at the period of distribution or at the death of the testator. The cases, in so far as illustrating the rule of evidence, have been collected by Mr Dickson (b). The bearing of those questions upon the law of succession has been noticed in the introductory chapter on the Law of Vesting. For our present purpose it is sufficient to observe, that if there be a doubt as to the time when the death of a beneficiary took place, the trustees ought not to pay without the protection of a decree of Court; unless, indeed, it is clear that the circumstances do not affect the descent of the beneficial interest. In the latest case (c), an absence of thirteen years was not held sufficient to overcome the presumption of life in a person who was fifty-seven years of age when last heard of, and who had previously been in the habit of regularly corresponding with his friends. Where the Court has ordered payments to be made in such circumstances, the payment has generally been qualified by the condition of finding caution to refund (d).

Questions as to authority to receive.

Trustees ought to be careful, if they pay to a beneficiary indirectly, that the party by whom the money is actually received has authority to act for his principal; for in the event of their paying through an unauthorized channel, as, for example, to a judicial

(a) See *Cathcart v. Moodie*, 17 Feb. 1804, F. C.; *Ogilvie v. Boswell*, 24 May 1850, 12 D. 940; *Mackenzie v. Thomson*, 12 Nov. 1846, 9 D. 85; *Jeffrey v. Ure*, 21 June 1825, 1 W. & S. 565, revg. 2 S. 646.

(b) Dickson, Ev. 188-190; and see *Dig. voce* Presumption; and cases cited *infra*.

(c) *Maltman's Factor v. Cook*, 14 Mar. 1862.

(d) *Chambers v. Chambers*, 14 July 1849, 11 D. 1359; *Stirling v. Mac-*

kenzie, 11 Mar. 1847, 9 D. 923; *Garland v. Stewart*, 12 Nov. 1841, 4 D. 1; *Campbell's Trs. v. Campbell*, 1 Feb. 1834, 12 S. 382; *Hyslop*, 15 June 1830, 8 S. 919; *Fettes v. Gordon*, 7 July 1825, 4 S. 149; *Lord Ashburton v. Baillie*, 7 Feb. 1811, F. C. The same course has sometimes been taken when there was a possibility of the legatee's right being defeated by the birth of children. (See Chapter XLIV. Section 3.)

factor or curator who has not found caution (a), or to an agent or mandatory whose commission has expired (b), and the money being misappropriated or lost before reaching the principal, they may be compelled to pay over again. A trustee is entitled to pay to the father of a minor in his character as administrator-in-law, though, if the circumstances of the father are such as may suggest doubt with regard to the safety of the money, they ought either to have the fund distributed under the authority of the Court, or to require security for the safe keeping of the money (c).

Questions as to the power of the beneficiaries in whose names trust money has been invested in terms of a direction, to uplift the sum in a bond, and discharge the creditor, cannot be tried in the form of a multiplepinding, but may be competently raised in a suspension. The Court may, if necessary for the protection of contingent interests, require the debtors to enter into an obligation to reinvest the money, as a condition for granting authority to make the payment (d).

Discharge by beneficiary having a limited title.

The liability of the trustee to replace funds which have been paid in error to a wrong party may be extinguished by prescription or taciturnity; and if the error be merely one of fact, not coupled with gross negligence, the plea of *bona fide* payment will be available to him. These defences are considered in the subsequent chapter (e).

Extinction of liability for erroneous payment.

It may be asked, whether trustees are relieved from the consequences of having made an erroneous distribution of the estate by having acted upon the advice of counsel (f). The only answer that can be given is, that erroneous advice is no excuse for acting contrary to law; but that in transactions depending upon matters

Advice of Counsel.

(a) *Donaldson v. Kennedy*, 18 June 1833, 11 S. 740.

(b) *Kennedy v. Kennedy*, 15 Nov. 1843, 6 D. 40.

(c) *Stevenson v. Dumbreck*, 11 Feb. 1861, 4 Macq. 86. See this point more fully noticed, *infra*, p. 106, *et seq.*

(d) *Moncrieff v. Bethune*, 1 June 1844, 6 D. 1100; 25 Feb. 1846, 8 D. 548.

(e) Chapter XXIX. (Beneficiary's Right of Action against the Trustee).

(f) Trustees are of course entitled to the expense of consulting counsel on all doubtful matters, for they are entitled to such extrajudicial direction as can be obtained, at the expense of the estate; although they are not justified in acting upon it if erroneous, as it is their duty in doubtful cases to seek the direction of the Court (*Shepherd v. Hutton's Trs.*, 24 Feb. 1854, 17 D. 516; see 523, per Lord J.-C. Hope).

of fact, or upon discretion, where the doctrine of *bona fides* affords a relevant defence, the fact that the course taken by the trustees was in accordance with the recommendation of an experienced legal adviser, would go far to support the defence founded upon that plea (a). It is clear that the fact of having been erroneously advised by counsel is no justification to trustees for erroneously investing the trust funds. This defence was expressly overruled in *Morrison v. Miller* (b), where trustees were held liable in damages for refusing to invest in the funds on the requisition of the beneficiaries; and in *Pollexfen v. Stewart* (c), where the complaint was, that instead of purchasing lands as directed, the trustees had invested in the purchase of feu duties.

Trustee is entitled to an unconditional discharge.

Elliott's Trs. v. Elliott.

If a trust is wound out of Court, the trustees may require the legatees of the residuary interest to execute a discharge in their favour; and such discharge must be unconditional, and ought to include an obligation to relieve the trustees from any contingent liabilities arising upon the settlement, which may be supposed to be outstanding. This is illustrated by the case of *Elliott's Trs. v. Elliott* (d), where trustees having been required to denude of the residuary estate in fulfilment of the ultimate purpose of the trust, they objected, that although the heir had offered to leave a certain sum in their hands to answer any contingent demands that might be made on them, and also to find security for any expenses they might incur in discussing objections to their accounts, *if they should be found entitled thereto*, the offer was qualified by a reservation of all objections competent to the heir to their accounts and manage-

(a) In an English case, noticed by Mr Lewin, where an executor was induced to make an erroneous payment by a misconception as to the effect due to a foreign promissory note which had been granted by the truster without consideration, Lord Alvanley said, that if the trustee had been advised by English counsel to make the payment, he would not have held him liable; for a testator could not be permitted to lay a trap for his executor, by doing a foolish act which might mislead him (*Bez v. Imray*, 5 Ves. 141). And in *Leslie v. Baillie*,

executors were held excusable for having made an erroneous payment from misconception as to the right of the beneficiaries under the law of Scotland, on the ground that they were not bound to know the law of a foreign country (2 Y. & C., Ch. Ca. 91).

(b) *Morrison v. Miller*, 9 Feb. 1827, 5 S. 322.

(c) *Pollexfen v. Stewart*, 14 July 1841, 3 D. 1217.

(d) *Elliott's Trs. v. Elliott*, 3 July 1828, 6 S. 1058.

ment. From a report obtained in the action, it appeared that the objections here referred to involved the responsibility of the trustees for transactions, the effect of which could not be determined without an inquiry into the facts. The Court were of opinion that they had no power to compel the trustees to denude, unless they could at the same time grant them a discharge, and therefore remitted to the Lord Ordinary to proceed with the accounting.

The principle is further illustrated in *Edmond v. Dingwall's Trs.* (a), which was a case arising out of a trust of heritable property for economical management and payment of debts. The truster having brought an action of denuding, in which he stated a variety of objections to items of charge against the estate, and founded upon an extrajudicial offer to pay the balance claimed by the trustees, under reservation of the objections stated in his condescendence, the Lord Ordinary found specially, that all the objections stated to the accounts were either untenable, or had been departed from, and that, apart from the question of accounting, the trustees had stated no grounds for resisting the conclusions for denuding, decerned against the trustees, and found neither party entitled to expenses. But the Second Division, being of opinion that the trustees were entitled to retain the estate until they received a discharge in full, allowed them to take credit for the expense of resisting the action.

*Edmond v.
Dingwall's Trs.*

It has now been decided, that the legatee of a specific sum is not bound to grant a formal discharge, and that a simple receipt upon a penny stamp is a sufficient acquittance to the trustee (b). The Court professed to reserve the question, whether a formal discharge could be demanded from a residuary legatee. But it can scarcely admit of serious doubt, that the donees of a residuary interest are bound, not only to acknowledge receipt of the money, but to discharge the trustee of his intromissions.

A receipt is a sufficient discharge in the case of a legacy.

If the beneficiary refuses to grant, or is disqualified by reason of legal or conventional incapacity from granting, a valid extrajudicial discharge, the trustee is not bound to retain the property, or to wait for exoneration until an action of denuding is instituted against him. He may sue for his own discharge in an action of

Trustee entitled to judicial exoneration when he cannot obtain a discharge.

(a) *Edmond v. Dingwall's Trs.*, 16 Nov. 1860, 23 D. 21.

(b) *Fleming v. Brown*, 6 Feb. 1861, 23 D. 443.

exoneration at the expense of the estate. For example, where a power was given to trustees of a family settlement to retain the share of any child to whom they might think it improper to entrust it, either on account of extravagance, dissipation, weakness, losses in trade, or other unforeseen circumstances; and the husband of one of the trustor's daughters became insolvent, and was under trust, the Court, altering a judgment of Lord Meadowbank, allowed the trustee the expenses of obtaining a judgment on the question, whether he was bound to pay to the husband (a). It is quite settled, that the objection of no double distress will not hold where the trustee is unable to obtain an extrajudicial discharge, whether the difficulty arise from unwillingness to settle on the part of the beneficiaries, or from the minority or non-residence of any of the parties. The plea that all the trustees do not concur, is equally irrelevant; because the object sought in an action of exoneration is the indemnity of the individual trustee (b). One trustee is not justified in opposing an action of exoneration against his co-trustee, on the ground that the latter had taken no active part in the management of the trust, or that there is no apparent risk of liability; for although the trustee has not interfered actively, he may nevertheless have incurred liability (c). "It is not necessary," said Lord Fullerton, in a case of this kind (d), "that there should be actual competition; it is enough that there is a possibility of competition. I cannot see what interest the co-trustee had to oppose the action. It is said that it occasioned unnecessary expense. If the parties interested had been all paid, and were ready to grant discharges, what matter is it whether the discharges were given before or after the raising of the action? There was nothing but a formal action brought to make the raiser perfectly safe. The only expense has arisen from the opposition" (e). Where the same body of trustees hold separate appointments under two different deeds relating to the same succession, they have been held entitled to

(a) *Neilson's Trs. v. Peacock*, 11 Dec. 1822, 2 S. 89.

(b) See *Taylor v. Noble*, 24 May 1836, 14 S. 817, where both objections were repelled, first by Lord Corehouse, and afterwards by a unanimous judg-

ment of the Court; and *Cumming v. Hay*, *infra*.

(c) *Cumming v. Hay*, 28 Feb. 1834, 12 S. 508; *Dunbar's case*, *infra*.

(d) *Dunbar v. Sinclair*, 14 Nov. 1850, 13 D. 54.

(e) 13 D. 60.

combine the affairs of both under one process of multiplepinding or exoneration (a).

If a beneficiary withdraws his instance from an action of denuding or count and reckoning, raised in the joint names of himself and one of the trustees against another trustee, the pursuing trustee, who is thus deprived of the means of obtaining judicial exoneration in the original action, may bring a multiplepinding and exoneration in his own name, at the expense of the trust estate, for the purpose of obtaining his discharge (b). Where an action of accounting was raised by beneficiaries, with concurrence of a trustee, against the other trustees, it was held that the representatives of the concurring trustee were not necessary parties to the suit; the argument on the other side being, that the defenders were entitled to have them sisted, in order that they might have better security for their expenses (c).

Trustee may sue for exoneration without consent of the Beneficiaries.

Where trustees are bound by the constitution of the trust to convey the estate to a different body of trustees, it is clear that the right of the original trustees to obtain their discharge, and, if necessary, judicial exoneration from their successors, must depend upon the same conditions which regulate the rights of trustees denuding in favour of the beneficiaries themselves. Thus, a judicial factor who has been allowed to retire, is entitled to exoneration before handing the estate over to his successor, and may claim the expenses of his discharge from the estate, in the event of an action of accounting being instituted against him (d). It may be observed, that in this case the interest of the retiring trustee, or body of trustees, to obtain exoneration from the Court is peculiarly strong; for although the purposes of the trust are supposed not to have been exhausted, and the trustee would not therefore be in a position to ask a discharge from the beneficiaries themselves, he must cede possession of the documents which instruct his administration and vouch his payments. And no discharge which the new administrators could grant in their fiduciary capacity would be available to the outgoing trustee either as a personal obligation of indemnity,

Exoneration of Trustees denuding in favour of other Trustees.

(a) *Cumming v. Hay*, 28 Feb. 1834, 12 S. 508.

(b) *Fotheringham v. Saltoun*, 31 Jan. 1852, 14 D. 427.

(c) *Darling v. Adamson*, 20 Nov. 1841, 4 D. 48.

(d) *Myles v. Ireland*, 6 Mar. 1855, 17 D. 591.

or as a bar to subsequent actions at the instance of beneficiaries who were not parties to it.

Whether discharge can be opened up.

Implied discharge and homologation.

After a trustee has been formally discharged, it is incompetent to open up his transactions, unless upon precise and relevant averments of actual fraud (a). Acts of constructive fraud, as, for example, purchases of the trust property by the trustee, afford no sufficient ground for reopening accounts after a final settlement, as such transactions, being within the knowledge of the parties, are held to be condoned by the discharge (b). And even the implied discharge arising from long taciturnity, amounting to acquiescence, has been held sufficient to protect the trustee against an action of payment (c), or for breach of trust. But the law will not readily presume that a party has consented to injustice; and in order that tacit consent may be available as a protection, the party must have been *sui juris* (d), not ignorant of his rights (e), and fully aware of the true nature of the transaction (f). A mere *non repugnantia* is not sufficient homologation (g). On the other hand, a letter authorizing a trustee to proceed with a sale of trust property to himself, and promising not to challenge it, will be binding on the writer (h). And where a bankrupt had been present at the sale of his estate, and had acted as attorney for the trustee when infetment was passed on his purchase, and concurred with the creditors in a petition for the exoneration and discharge of the trustees, the Court unanimously assailed the trustee from a reduction at the instance of the heir of the bankrupt (i). It may be mentioned that in this case the bankrupt had also taken a *lease* of part of the estate from the trustee, and lived on the estate for thirty-nine years before the challenge. In an early case, a back-bond of trust found in the

(a) *Campbell v. Montgomery*, 30 May 1822, 1 S. 446; *Robertson v. Scott*, 3 July 1834, 12 S. 875; *Macpherson v. Macpherson*, 16 July 1841, 3 D. 1242; *Blyth v. Chisholm*, 2 Mar. 1833, 11 S. 512; *Kyle's Tr. v. Allan*, 23 Nov. 1832, 11 S. 87; and see *Hume v. Stewart*, 26 Nov. 1834, 13 S. 90.

(b) *Duke of Gordon v. Innes*, 5 July 1822, 1 S. Ap. Ca. 169; *Thorburn v. Martin*, 8 July 1853, 15 D. 845; *Robertson v. Scott*, *supra*.

(c) *Scott v. Mitchell*, 27 May 1830,

8 S. 820; *Stewart v. Maconochie*, 4 Feb. 1836, 14 S. 412.

(d) *Irving v. Tait*, 3 June 1808, F. C.; M. Appx. Death-bed, No. 6; *Brodie v. Brodie*, 6 July 1827, 5 S. 900.

(e) *Duke of Gordon v. Innes*, *supra*.

(f) *Thorburn v. Martin*, *supra*.

(g) *Taylor v. Watson*, 20 Jan. 1846, 8 D. 404.

(h) *Duff v. Gorrie*, 23 May 1849, 11 D. 1054.

(i) *Fraser v. Hankey*, 13 Jan. 1847, 9 D. 415.

repositories of the trustee, was held to afford a presumption that the trust was discharged (a).

Where the beneficiaries consist of a numerous class of persons, as, for example, the truster's creditors in bankruptcy, a discharge by the general body will not deprive the individual creditor of his right to reduce an illegal transaction, unless some act of acquiescence can be brought home to him (b).

One Creditor is not bound by a discharge executed by other Creditors.

A discharge of trust intromissions, as it is a deed which the beneficiary is under obligation to grant, will not be extended so as to affect other interests than those to which it was intended to apply. For example, a discharge granted to trustees does not imply a renunciation of the granter's legal provisions in a question with other beneficiaries (c). Where several beneficiaries execute a joint discharge in favour of the trustee for their respective rights and interests, with a clause of absolute warrandice, they are not held to warrant the validity of the discharges by one another; for absolute warrandice in a discharge imports no more than an indemnity to the trustee by each party to the extent of the share of the funds which he has himself received (d).

Legatee discharging a Trustee does not impliedly discharge his claims in a question with competing Legatees.

If trustees, directed by their deed of constitution to invest money on proper heritable security in favour of a married woman, excluding her husband's *jus mariti*, advance the money to the husband, the discharge of the wife, granted *stante matrimonio*, will not bar her right of action after she acquires a separate standing. For, in the first place, her consent to allow the money to be received by her husband is a *donatio inter virum et uxorem*, and revocable; and in the next, it is clear that as the trust has been created for the protection of the wife's separate interest, the trustees have a curatorial duty to discharge, and cannot, without a direct breach of trust, devolve the custody of the estate upon the husband (e).

Husband cannot discharge his Wife's claims where *jus mariti* excluded.

How far Wife's discharge is effectual.

Although, as we have seen, any member of a body of trustees is entitled to institute proceedings in his own name for the purpose

Trustee cannot wind up without judicial authority in the absence of his Co-trustees.

(a) *Charteris v. Charteris*, 1712, M. 11413.

(b) *Thorburn v. Martin*, 8 July 1853, 15 D. 845, per Lord Wood.

(c) *Halbert v. Dickson*, 13 Feb. 1851, 13 D. 667. And see Chapter XLII. (Election).

(d) *Macfarlane v. Donaldson*, 12 May 1835, 13 S. 725. See Lord Mackenzie's remark, p. 734.

(e) *Mayne v. M'Keand*, 4 June 1835, 13 S. 870; *Ross v. Allan's Trs.*, 13 Nov. 1850, 13 D. 44. See Chapter XXXIV. (Wife's separate Estate).

of obtaining *exoneration*, a sole resident trustee is not entitled to *wind up* the trust in the absence of his colleagues. In several instances, however, the Court of Session has granted authority to a resident trustee to wind up the trust alone, on the ground of the absence of the other trustees, and the inexpediency of appointing a factor (a). The cases have been noticed in a previous chapter (b).

Trustee must be
kept *indemnified*.

Before a trustee can be required to denude, he is entitled to be indemnified for his expenditure on behalf of the trust, and to be relieved of obligations undertaken in his fiduciary character. On this point, reference is made to the preceding chapter (c).

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| <p>(a) Pet. <i>Millar</i>, 19 Jan. 1854, 16 D. 358; Pet. <i>Fraser</i>, 1 Mar. 1837, 15 S. 692; Pet. <i>Findlay</i>, 30 June 1855, 17 D. 1014; <i>Watson v. Crawcour</i>, 17 Feb. 1844, 6 D. 687; <i>Lauder v. Lauder's</i></p> | <p><i>Trs.</i>, 12 Nov. 1851, decided 19 July 1851, 14 D. 14.
(b) Chapter XIV. Section II. (Appointment of New Trustees).
(c) Chapter XXV., pp. 62-66.</p> |
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PART III.

OF THE EQUITABLE ESTATE.

CHAPTER XXVII.

OF THE NATURE OF THE BENEFICIAL OR EQUITABLE INTEREST IN THE TRUST ESTATE.

THE distinction between the specific property or interest which forms the subject of conveyance in a deed of trust, and the beneficiary's right to that property or interest, is a very obvious one; and yet, from inattention to this distinction, the real nature of the beneficiary's right to the trust estate has either been misunderstood, or imperfectly stated, by the authorities in the jurisprudence of Scotland who have professed to deal with the subject (*a*). The beneficial interest has been defined as a *jus crediti* against the

The equitable estate is a right of property.

(*a*) For example, Mr Forsyth designates the interest of the beneficiary as "an assignable or disposable personal right or *jus crediti*" (Forsyth, Tr. 329),—a definition which, although correct so far as it goes, does not sufficiently mark the distinguishing property of the beneficial interest as creating a nexus over the trust estate. Professor Bell's definition, according to which the beneficial interest "gives only a *jus crediti* or personal action against the trustee, to execute the trust or to denude" (Bell's Com. 853, 5 Ed. I. 37), is liable to the same criticism; though he elsewhere explains that the declara-

tion of trust creates a real burden on the fee vested in the trustee. The observations of Lord Cranworth in *Edmond v. Gordon* (26 Feb. 1828, 3 Macq. 122), as to the obscurity which pervades the distinction, or rather the want of distinction, between *jus ad rem* and *jus crediti* in the writings of Scotch legists, appear to be well founded; but unfortunately his Lordship's attempted distinction only makes the confusion worse. It is hoped that the analysis in the text (which, but for the confusion complained of, might seem needlessly minute) may help to elucidate the matter.

trustee ; a definition which, if accurate at all, is only accurate when applied to the case of a beneficial interest arising under an *ex facie* absolute disposition qualified by a separate declaration. The beneficial interest under deeds of settlement conveying the estate ostensibly for uses and purposes, may be more correctly defined as a personal right of property in the estate which is the subject of disposition. It is a right of property in the same sense that a ground-annual, real burden, or other right by reservation, or an estate standing upon a decree or minute of sale, is a right of property. For, although the *title* to the estate stands in the person of the trustee, the *interest* of the beneficiary is by the terms of the trust deed protected, in so far as the nature of the property in each particular case admits of protection, against the acts of the trustee and his creditors.

Equitable estate defined by Lord Westbury.

Referring to the distinction which had been taken between the *jus crediti* of a beneficiary under a trust settlement and the estate itself, in regard to questions of succession and the mode of transmission, Lord Chancellor Westbury observed in a recent case, "It is a distinction in name, and not in fact, for the *jus crediti* is no more than another denomination of what may be called the estate of a beneficiary, or an *equitable estate* ; and it receives that title only when it is regarded under the aspect of the right which the beneficiary has to call upon the trustees to convey, to transfer, or to denude themselves of the possession of the subject" (a).

Equitable estate in personal property is a real and preferable right ;

The beneficiary, it is obvious, can in no case have a title of a higher quality than that which has been granted to the trustee. If, for example, the trust estate consist of a right in the nature of a liquid debt,—*e.g.*, a right to the sum in a personal bond, bill of exchange, or policy of insurance, after the obligation has fallen due,—the right of the trustee is but a *jus crediti*, and the beneficiary who claims through him can have no higher title. The trustee, as creditor in the legal obligation, may uplift the contents ; and if he misappropriate the money, the beneficiary has no remedy except by a personal action against the trustee. Even in the case of moveable rights, which are not immediately prestable, the legal character of the beneficiary's interest is similar to that of the trustee ; but it is liable to be defeated through the exercise of the power, which the

but defeasible by assignment of the estate.

(a) *Buchanan v. Angus*, 15 May 1862, House of Lords.

trustee possesses at common law, of assigning and changing the securities of the personal estate conveyed to him. But this power may, in certain cases, be withheld. If, for example, the truster qualify a trust disposition of Government stock, bonds, shares, or the like, by an express direction to convey the subject specifically to a certain beneficiary, it is obvious that the beneficiary, although not the titular proprietor, has a right of property in the subject of conveyance, which he may vindicate in competition with onerous assignees of the trustee, on the principle that the title of the latter was qualified by the purpose of specific conveyance. This illustration, when compared with the case of the beneficiary's right to a heritable bond destined specifically to his use, may serve to establish the proposition that there is no difference between the nature of the beneficiary's interest in heritable and moveable property. In the case of the heritable bond, the beneficiary's right being a personal right to heritable estate, might at first be supposed to carry with it a higher degree of security; but the truth is, that in both cases the beneficiary's right is a personal right of property in the subject, which he may enforce, first, by preventing the trustee from assigning to another, and secondly, by compelling the trustee to assign to himself.

Again, while the beneficiary's right to feudal subjects in a question with third parties, is that which the trustee's title is capable of conferring, his equitable interest—in other words, the security which the trust deed gives him against the fraudulent acts of the trustee—is in no degree connected with the nature of the trustee's title, but depends solely on the form of the trust. Where the purposes are embodied or referred to in the deed of conveyance, purchasers from a trustee selling without authority will be liable to the beneficiary in the same manner as the trustee himself would be liable (a). A power of sale does, of course, very much impair the beneficiary's security against the voluntary acts of the trustee; but it cannot alter the nature of his interest as a right of property. By the exercise of this power, the beneficiary loses the means of enforcing

Nature of the equitable estate in heritable property.

Effect of power of sale.

(a) On the same principle the right of the beneficiary is preferable to that of creditors adjudging, or in bankruptcy, from the trustee after infeftment, when the purposes are embodied in the disposition. (*Macdowal v. Russell*, 6 Feb. 1824, F. C., and 2 S. 682).

his right *in rem*, and his right is converted into a claim to the proceeds of the converted estate. But while the estate remains unsold, his interest in the specific estate remains to him, and is effectual in bankruptcy, as a right of property in the estate, and not merely as a *jus crediti* (which would only entitle him to rank for a dividend). A power of sale, therefore, while it impairs the beneficiary's security against fraud, does not alter the nature of his proprietary right, or "equitable estate." He is in this respect in no worse position than that of a fee-simple proprietor possessing on a personal title, who has granted a power of sale to a commissioner.

Equitable estate under an *ex facie* absolute disposition.

In case of property held personal, it is a *jus ad rem*.

In case of feudal estate, it is *jus crediti* simply.

The beneficiary's right to estate conveyed under an *ex facie* absolute disposition, is also a personal right of property, with this difference, that as his interest has not been made a burden upon the trustee's title, it is not a *jus in re* enforceable against onerous assignees of the trustee (a). It is, however, a personal right of property—*jus ad rem*—giving the beneficiary a preference in bankruptcy (b), and in questions with adjudgers from the trustee (c). It is to be observed, however, that there is no such title known in law as a personal right qualifying a feudal estate; and therefore, if a trustee, clothed with an *ex facie* absolute title, take infeftment on the estate, the beneficiary loses his personal title, and retains only a *jus crediti* or right of action against the trustee, whether that consist in a right to a share of succession, or to specific conveyance. Adjudgers and creditors in bankruptcy have then the same rights as purchasers for a valuable consideration (d).

Equitable estate not defeasible by refusal of the Trustee to accept.

It was at one time attempted to be maintained, that as the beneficiary had no direct title to the trust estate, the refusal of the trustees of the settlement to accept while the vesting of the beneficial interest remained in suspense, would defeat the trust. But this view was clearly irreconcilable with the true theory of the beneficiary's interest as a proprietary right; and accordingly it was found in *Fraser v. Fraser* (e), that the beneficiary was entitled

(a) *Redfearn v. Somervilles*, 1 June 1813, 5 Paton, 707; reversg. M. Peral. & Real, No. 3; *Burns v. Lawrie's Trs.*, 7 July 1840, 2 D. 1348.

(b) *Gordon v. Cheyne*, 5 Feb. 1824, F. C.; *Dingwall v. M'Combie*, 6 June 1822, 1 S. 463.

(c) *Preston v. Earl of Dundonald's*

Crs., 6 Mar. 1805, F. C.; M. Pers. & Real, No. 2.

(d) *Calder v. Stewart*, 18 Nov. 1806, Hume, 440; see Baron Hume's note, and case of *Campbell v. Campbell*, 12 Feb. 1811, cited p. 444.

(e) *Fraser v. Fraser*, 2 Feb. 1810, Hume, 885.

to have his interest protected by declarator, in a question with a party who had served heir to the truster. In *Gordon's Trs. v. Harper* (a), it was contended that the assignee of a conditional institute, whose right under the trust destination was contingent upon certain events, could not call upon the trustee to denude in his favour unless his cedent had previously made up a title by service. But the Court, after a hearing in presence, came to be unanimously of opinion, that as the right of the institute was constituted by the trust disposition, service was unnecessary, and that assignation in any habile form was effectual to vest the right in the assignee. It would seem that if a party, erroneously believing himself to be in the possession of a full legal title to the estate, execute a conveyance of it in the dispositive form, the disposition will be effectual as an assignation of his beneficial interest under a trust settlement (b). The subject of the assignation of beneficial interests, as well as their transmission by legal descent, will be afterwards considered in treating of those interests as the subject of transmission.

*Gordon's Trs.
v. Harper.*

When the legal and equitable estates are united in one person, the latter is *eo ipso* extinguished, as a party cannot have an equitable claim upon himself. This doctrine, which in the law of England is termed "merger," and in Scotland is described by the civil law term "confusion" (c), seems to have place only when the entirety of both estates passes into the same person; for if a trustee take only a partial beneficial interest in a trust, *e.g.*, a legacy, his unqualified interest in the legacy cannot merge in his qualified title as trustee of the estate (d).

Extinction of
the equitable
estate by
confusion or
"merger."

Again, a trust may be employed as a means of separating the titles of two interests in the same subject, which, if allowed to remain in the person of the same proprietor, would merge. For example, an heir of entail who has paid off bonds affecting the estate, may assign them to a trustee to be held by him as a security, or subject to the purposes of the truster's testamentary dispositions.

By means of
a conveyance
to a Trustee,
collateral
rights may be
prevented
from merging.

(a) *Gordon's Trs. v. Harper*, 4 Dec. 1821, 1 S. 185. See *Stainton v. Stainton's Trs.*, 25 Jan. 1850, 12 D. 571.

as may be seen by comparing Mr Lewin's statement of the doctrine (Chapter XXIV. Section 4) with the text of the civil law, Dig. Lib. 46, Tit. 3, L. 75.

(b) *Paul v. Boyd's Trs.*, 22 May 1835, 13 S. 818.

(c) The principle of merger is identical with that of extinction *confusione*,

(d) See *Mackenzie v. Gordon*, *infra*; *Telford v. Jamieson*, 12 May 1835, 13 S. 735.

In this case, although the two rights have actually met in the same person, yet the subsequent assignation of the bond is sufficient evidence of the intention to keep up the debt; and confusion, which is itself the creature of implied intention, cannot be inferred in contradiction to the evidence of intention arising from the acts of the party (a).

Collateral
rights do not
merge when
acquired by a
Trustee.

Another example of the union of the equitable and legal titles arises, where a trustee for creditors pays off heritable debts, and takes an assignation to the securities in his own name. In this case there is no merger of the debt in the general estate; and, therefore, if the trustee pay off a first heritable security, and afterwards assign the bond as a collateral security for a trust debt, a postponed creditor in a bond prior to the assignment cannot plead confusion, so as to deprive the assignee of the benefit of his preference (b). Lord Cottenham observed, that if the *owner* of the estate had paid off the debts and taken the assignment for his own benefit, a question of novelty would have arisen as respects the law of Scotland, though it was clear that according to English precedents the debt would be extinguished (c).

(a) See *Welsh v. Barstow*, 11 Feb. 1837, 15 S. 537.

(b) *Mackenzie v. Gordon*, 26 Mar. 1839, M'L. and Rob. 117; affg. 16 S. 311.

(c) M'L. and Rob. 123-4. In England, however, it must be observed that more weight is given to the element of intention than we should be

disposed to allow in this country, in a question as to the title to heritable property. The rules to which we refer appear to us to be too conventional to be much relied upon as safe guides in our practice; and further than by a simple reference to Mr Lewin's work (*Lewin, Tr.*, 4th Ed. 469), we do not think it necessary to trace them.

CHAPTER XXVIII.

OF THE BENEFICIARY'S RIGHTS DURING THE
SUBSISTENCE OF THE TRUST.

IN the present chapter we propose to consider the nature of the beneficiary's rights in relation to property specifically conveyed to his use, but to which he is not in a position to demand an immediate conveyance. The creation of a continuing trust is frequently necessary for the accomplishment of purposes of a testamentary character, such as the securing of annuities and life interests. In other cases, the object of the trust is to provide for the payment of debts, or the liquidation of burdens, out of the revenues of the estate, without diminishing the capital. In this class of trusts the equitable estate may very frequently be resolved into two separate interests; first, an interest given to one party in the present possession of the annual profits of the estate; and, secondly, a reversionary interest in the capital or fee. A complete view of the interests of equitable proprietors, under this twofold division of the subject, would involve an examination of the whole law of property in its relation to the interests of *liferenter* and *fiar*; but as we do not profess in this treatise to deal with the subject of property law, except in so far as it is affected by the separation of the beneficial and legal estates through the medium of a trust, it will not be necessary in this chapter to discuss the relative rights of *liferenter* and *fiar* *inter se*. We propose, therefore, to consider the rights which the beneficial conveyance gives to the *liferenter* and *fiar* respectively against the trustee and the trust estate, and the remedies competent to beneficiaries for a threatened breach of trust, pending the subsistence of the fiduciary relation.

Usufructuary
equitable
estates defined.

*I. Rights of Beneficiaries during the Subsistence of
the Trust.*

*When the
Beneficiary of
liferent estate
has the right
of possession.*

It may be laid down as a general rule, that a conveyance of heritable estate for the liferent use of a beneficiary will, unless the trust contemplates the profitable management of the estate by the trustees, and the payment of the surplus in the form of money, entitle the beneficiary to the enjoyment of the estate, and to the exercise of the beneficial rights of a usufructuary proprietor, subject to this qualification,—that as the title to the entire estate, including liferent as well as fee, remains in the persons of the trustees, the beneficiary cannot exercise the functions of a legal proprietor except through the intervention of the trustees. An equitable liferenter cannot put an end to the trust, either directly or by adjudging the liferent use, without the consent of the fiar; for the trustees are entitled to retain the title and the legal possession, in order to the preservation of the reversionary interest.

*Beneficiary of
a liferent estate
is not entitled
to denude the
Trustee.*

*Beneficiary has
not the powers
of a liferenter.*

Although the interest of an equitable liferenter is substantially the same as that of a liferenter by direct conveyance, his powers are materially different. To illustrate our meaning, it must be considered that a liferenter by conveyance is to certain effects a trustee for the fiar, as he is in fact vested with the interim management, and may, by the abuse of his powers in cutting timber, working minerals, etc., cause serious damage to the fiar's interests. The fiar, on the other hand, may create embarrassment by refusing his consent to acts for which it is necessary. One of the objects which a settlor may be supposed to have in view in the creation of a trust of a liferent interest, is the protection of the interests of liferenter and fiar against mutual encroachments, by vesting the estate in neutral custody, instead of leaving the parties to defend their rights by interdict. It is needless to point out how this purpose might be frustrated were it permitted to the liferenter to operate upon the estate by adjudication.

*Extent of
Beneficiary's
rights in life-
rent estate.*

Without entering into details which are generally understood and acted on, it is sufficient to say that a fiduciary liferenter of heritable property is entitled to the occupation of the mansion-house and grounds, and to the enjoyment of all the personal rights

and privileges of a proprietor (*a*). But in the granting of leases, the working of minerals, and other acts of profitable administration, he must act through the trustee, who will be bound to give effect to the views of his constituent, in so far as they are not injurious to the reversionary estate.

The interests of liferenters and fiars of moveable funds specifically destined, are similar in their reciprocal relations to those of heritable proprietors; though, from the more simple quality of moveable interests, few questions can arise in regard to management. The duty of the trustee is to retain the control of the fund, and to pay over the accruing interest as it arises. An extraordinary dividend or bonus falls to be added to capital, the liferenter being only entitled to the interest of it during his life (*b*). It would seem that a liferent annuitant is not bound to accept an annuity heritably secured, but may insist on having a capital sum invested, yielding interest equal to the annuity (*c*).

Right of an equitable Liferenter of moveable property

Liferent interests in moveable funds are frequently declared alimentary, and not subject to the diligence of creditors. In a former chapter (*d*), we have considered some questions as to the competency of alimentary trusts, and the mode of constitution. There can be no doubt as to the right of a settlor to attach such conditions to a liferent provision, as that it shall not be alienated or attached except for alimentary debts. But, except in the case of provisions to married women, the construction and legal effect of such provisions is not very closely connected with the subject of

Alimentary equitable estates.

(*a*) It has been held in England that a trustee cannot appropriate the shootings to his own use (*Webb v. Earl of Shaftesbury*, 7 Ves. 488; *Hutchinson v. Merrit*, 3 Y. & C. 547). In *Condie v. Macdonald* the Court refused to find a judicial factor liable for the rents of unlet shootings, on the ground, we presume, that they were reserved for the personal use of the beneficiary (20 Nov. 1834, 13 S. 61; see Lord Fullerton's note, 65). The beneficiary is also entitled to exercise the right of presenting to a benefice (*Grindlay v. Drysdale*, 4 July 1833, 11 S. 896; *Lewin, Tr.*, 4th Ed. 212; and cases cited *supra*, I. 217-18).

(*b*) *Irving v. Houstoun*, 27 July 1803, 4 Paton, 521; reported as *Rollo v. Irving* in M. 8283. A limited fiar, holding the fund under an obligation not to dispose or alter the destination gratuitously, is entitled to the capital of a bonus or extraordinary dividend (*Cumming v. Cumming's Trs.*, 26 Feb. 1824, 2 S. 748). See Chapter XXXVI. Section 3.

(*c*) *Wilson v. Beveridge*, 31 Jan. 1833, 11 S. 343. See *Forsyth v. Kilgour*, 15 Dec. 1854, 17 D. 208; *Davidson v. Dobie*, 13 Feb. 1828, 6 S. 536; *Grieve's Tr. v. Bethune*, 9 June 1830, 8 S. 896.

(*d*) Chapter VI. Section 2.

trusts, and does not seem to call for particular notice (a). The subject of trusts for the separate use of married women, excluding the *jus mariti* and right of administration, is discussed in a subsequent chapter.

Right of the
Beneficiary of
a reversionary
interest.

As we deal in the present chapter merely with the rights of beneficiaries during the subsistence of the trust, our observations upon the interest of the *fiar* may be comprised within a few sentences. As the beneficial interest of a *fiar* emerges only on the expiration of the *liferent* or usufructuary interest, his powers during the subsistence of the trust extend no further than to the protection of his reversionary estate. In the case of a trust which is to subsist until debts are paid off, the position of the *fiar* in possession prior to the period of denuding, and his relations with the trustees, are very similar to those of an equitable *liferenter*. In effect he may be said to possess the powers of a proprietor, by reason of the influence which he may bring to bear upon the trustee. But, in a legal point of view, his rights are remedial rather than potential, as, in the event of the trustee insisting on taking an independent course, the proprietor can do nothing without the authority of the Court. The intervention of the Court may be sought, where a change in the management is desired, in the form of an application for sequestration (b), or for the appointment of a judicial factor on the estate; or, if otherwise, by an application for interdict. The sub-

(a) See *Stair*, 3, 1, 37; *Ersk.* 3, 6, 7; *Bell's Com.* 528; *Monypenny v. Earl of Buchan*, 11 July 1835, 13 S. 1112; *Harvey v. Calder*, 13 June 1840, 2 D. 1099; *Waddell v. Waddell*, 26 Nov. 1836, 15 S. 151; *Rennie v. Ritchie*, 25 Apr. 1845, 4 Bell, 221. It would seem that a fee cannot be made alimentary, because the beneficiary's *jus disponendi* enables him to defeat the restriction. See on this point *Urquhart v. Douglas*, 1738, M. 10403; *Elchies' Notes*, p. 20, No. 8. It is doubtful whether corporeal moveables can be secured against the diligence of creditors even by means of a trust (*Borthwick v. Urquhart*, 17 Feb. 1829, 7 S. 420; *Fraser v. Frisby*, 26 June 1830, 8 S. 982. But

see *Macmillan v. Bryce*, 13 May 1837, 15 S. 916; *Ross v. Fleming*, 19 Dec. 1850, 13 D. 373; and *Young v. Loudoun*, 26 June 1855, 17 D. 998, with reference to *liferent* conveyances of furniture).

(b) In *Fraser v. Thorburn*, the Court awarded sequestration of an heritable trust estate at the instance of a beneficiary (15 Dec. 1855, 18 D. 264). But in a later case, where the trust was constituted by an *ex facie* absolute disposition, sequestration of the heritable estate was refused on the ground that the trust was truly a security transaction (*Viscountess Hawarden v. Dunlop*, 31 May 1861, 23 D. 923).

ject of judicial factory being reserved for separate discussion, it is unnecessary to enter at present on the grounds which entitle an equitable proprietor to claim the benefit of this extraordinary remedy. We shall conclude, therefore, by adverting to the cases in which resort has been had to preventive process for the protection of the beneficiary's interest against the acts of the trustee.

II. *Prevention of Breach of Trust by Suspension and Interdict.*

The right of the party beneficially interested in a trust estate to restrain the exercise of a power by interdict, is a necessary incident of the proprietary right which, as we have seen, belongs to the beneficiary under a trust disposition. This right, however, cannot be exercised except with the sanction of the Court. Accordingly, the remedy is by interdict, not by inhibition (a). Apparently the first reported case is that of *Nisbet v. Grahame* (b), where a proprietor having granted a trust disposition of his estate for behoof of creditors, and having afterwards, on the allegation that the deed had been impetrated by force and fear, recalled the trust, and granted a new disposition with powers of sale to another party, who took infestment—the Court, pending the discussion of the question as to the validity of the second trust, granted interdict against the trustee exposing the property to sale. In a subsequent case (c), where the Court, on a consideration of the merits of the application, refused to interdict a trustee from the execution of the power of sale, and the case was taken by appeal to the House of Lords, the Court, in the exercise of its powers of interim regulation pending appeal (d), passed a new bill of suspension and interdict pending the appeal. In another case, where trustees vested with a power of sale for the payment of debts had sold a portion of the estate, realizing a sum which was *prima facie* sufficient for payment of the trust debts, interdict was granted against the sale of the remainder of the property until the trustees had rendered a proper account of their intromissions (e). So also, interdict has been granted to prevent a sale by a heritable creditor

Source of the Beneficiary's preventive rights.

Examples of interdict against abuse of powers.

(a) *E. of Lauderdale v. E. of Fife*, 9 Mar. 1830, 8 S. 675; *Hamilton v. Henderson*, 20 May 1857, 19 D. 745.

(b) *Nisbet v. Grahame*, 9 Feb. 1822, 1 S. 307.

(c) *Innes v. Innes*, 18 Dec. 1828, 7 S. 206.

(d) *Innes v. Innes*, 13 June 1829, 7 S. 762.

(e) *Pender v. Ferguson*, 17 Nov. 1831, 10 S. 19.

at an insufficient upset price, to the injury of a postponed creditor (*a*).

Interdict
against abuse
of powers by
public Trus-
tees.

In another class of cases, interdict has been granted against the contemplated acts of parliamentary trustees in excess of the powers conferred on them by statute (*b*), among which we may include the cases where trustees have been interdicted from applying the trust funds towards the expense of applying to Parliament for an extension of their powers (*c*).

In *Sawers v. Monteith* (*d*), a note of suspension and interdict at the instance of a beneficiary holding a contingent interest in a trust estate against an intended payment to another beneficiary, which was alleged to be in breach of trust, was refused on the ground that the trust funds remaining in the hands of the trustees were sufficient to secure the interest of the applicant. However, it cannot be doubted, that if a sufficient case for judicial interference were shown, a beneficiary might protect his interest by interdict against ultraneous payments on the part of the trustees.

Interdict
against abuse
of ordinary
powers.

Interdict is also a competent remedy in prevention of the abuse of the trustees' ordinary powers of administration; as examples of which, we may refer to the cases where trustees have been interdicted from taking infetment in defraud of the rights of preferable creditors (*e*); from accepting the resignation of a co-trustee in opposition to the wishes of the beneficiaries (*f*); and from carrying on proceedings before foreign Courts of law, to the injury of the estate (*g*).

(*a*) *Kerr v. M'Arthur's Trs.*, 28 Dec. 1848, 11 D. 301. See as to the powers of trustees in trusts for sale, Chapter XVII. Section 1, and particularly Vol. I. pp. 345-6.

(*b*) *Menzies v. Duff*, 30 June 1827, 5 S. 884; *Todd v. Clyde's Trs.*, 29 Nov. 1843, 6 D. 108; *Tullis v. Mags. of Edinr.*, 18 Dec. 1847, 10 D. 261; *Taylor v. Com. of Police for Kilmar-nock*, 5 Feb. 1858, 20 D. 501.

(*c*) *Mackintosh's Trs. v. Mackintosh*, 30 June 1852, 14 D. 928; *Brown v. Adam*, 19 Feb. 1848, 10 D. 744; *Attorney-Gen. v. Andrews*, 2 M'N. & G. 225. But the Court cannot re-

strain the trustees from proceeding with a bill before Parliament, at their own risk (*Anstruther v. East of Fife Ry. Co.*, 19 April 1852, 1 M'Q. 98. See Vol. I. p. 479, *supra*).

(*d*) *Sawers v. Monteith*, 29 Nov. 1861, 24 D. 101.

(*e*) *Tatnall v. Reid*, 2 Feb. 1827, 5 S. 277.

(*f*) *Reid v. Maxwell*, 6 Feb. 1852, 14 D. 449.

(*g*) *Young v. Barclay*, 27 May 1846, 8 D. 774; *British Linen Co. v. Marquis of Breadalbane*, 24 Dec. 1836, 15 S. 356; *Dawson's Trs. v. Maclean*, 4 Feb. 1860, 22 D. 685; *Carron Co. v.*

When the administration of a trust estate has been brought under the control of the Court by an action of distribution, the trustee may be required to find caution to account for the funds in his hands where his circumstances are such as to render that step expedient (a). But where danger is apprehended to the estate, the more usual course is to appoint the trustee to consign the fund, subject to the orders of the Court.

Stainton, 27 Jan. 1857, 19 D. 318. (a) *Ryrie v. Ryrie*, 7 Mar. 1839, 1
See Chapter IX. (Foreign Law and D. 647.
Jurisdiction).

CHAPTER XXIX.

OF THE EQUITABLE INTEREST CONSIDERED AS A RIGHT OF ACTION AGAINST THE TRUSTEE.

Beneficiary's
right of action
against the
(1) Trustee, or
(2) the Trust
Estate.

HAVING discussed the remedies competent to a beneficiary seized, through the trustee, of a specific subject, we proceed to consider in the next place the right of action, or *jus crediti* which the beneficiary has, and which he may put in force, for the purpose of having his interest in the estate ascertained, and the amount paid over or transferred to him. The right to sue for his share of the trust estate is one which belongs to all beneficiaries, being the counterpart of the obligation resting on the trustee to preserve the estate for the purposes of the trust; and this general right may be enforced under any form of action adapted for trying the question of interest or of liability (a). The beneficiary's claim is either directly against the trust estate, or indirectly by way of a personal action against the trustee, which may be followed up, if necessary, by diligence against the estate. The mode of completing a direct title to the estate falls to be considered in a subsequent chapter; and it will be more consistent with our purpose of viewing the beneficiary's right as a *jus crediti*, that we should confine our view at present to the right of action against the trustee.

Trustee is
accountable,
in the first
instance, in
the forum of
administration.

Prima facie, the trustee is answerable to the beneficiary in the Courts of the jurisdiction in which the property of the trust is situated, and in which he has received authority to administer.

(a) Where the right claimed by the beneficiary is not a mere interest in property, but a right to enforce the fulfilment of the purposes for which money has been bequeathed or subscribed, it may be enforced by an action against the trustee. See the cases on Charitable Trusts, *supra*, I.

434, 444. Where money has been subscribed to carry on a private undertaking, any one of the subscribers has a *jus quæsitum* to enforce the prosecution of the common enterprise, and to prevent the premature dissolution of the society (*Baird v. Ross*, 22 Mar. 1856, 2 M^cQ. 61).

And this liability to answer in the forum of administration is a sufficient reason why the trustee should not be liable to an action of denuding, or be compelled to part with the custody of his funds by the Courts of a different jurisdiction. Accordingly, in the leading case of *Preston v. Preston's Trs.* (a), where one of the beneficiaries of a Scotch settlement had taken out administration in England, and was afterwards sued by the trustees in the Court of Session, who demanded that the English estate should be transferred, to be by them applied in fulfilment of the purposes of the settlement, the House of Lords directed that the action should be dismissed. Lord Cottenham, Ch., remarked, "The domicile of a deceased party regulates the right of succession to his moveable property; but the administration must be in the country in which possession of his property is taken and held under lawful authority" (b).

But while it may be assumed that the legal administrator cannot be deprived of the custody and control of the trust fund, pending the *subsistence* of the trust, by the Courts of a jurisdiction other than that from which his appointment emanates, it does not follow that an executor or trustee may not be called to account for his intromissions or convened in an action of denuding before any Court, to whose jurisdiction he may on other grounds be subject. The judgment of the Lord Chancellor in *Preston's* case reserved this question, or rather, the liability to account in the forum of the domicile was taken for granted in the Chancellor's opinion (c).

The jurisdiction of the forum of administration is not exclusive.

The case of *Young v. Ramage* (d) has been cited as an authority for the proposition, that foreign executors cannot be made amenable to the jurisdiction of the Courts of Scotland by means of arrestment *jurisdictionis fundandæ causæ*. But the case, when examined, will be found to bear a different interpretation. It appears from Lord Corehouse's opinion, that the jurisdiction had been sustained; for a remit was made under which an opinion was obtained as to the duties of executors under the law of Guernsey; and on its being ascertained that by the law of that island (which on this point was in harmony with general jurisprudence) the exe-

Young v. Ramage.

(a) *Preston v. Preston's Trs.*, 29 Mar. 1841, 2 Rob. 88. and Session in regard to the disposal of the surplus estate, 2 Rob. 106-7.

(b) 2 Rob. 105.

(d) *Young v. Ramage*, 16 Feb. 1838,

(c) See his Lordship's remarks on the power of the Courts of Chancery 16 S. 578.

cutor was not bound to distribute the estate until a reasonable time had been allowed for ingathering and realizing the assets, the judgment of the Court was pronounced—not dismissing the action on the ground of defect of jurisdiction, but preferring the executors to the arrested fund, on the ground that they were entitled to proceed with the realization of the estate without interruption. In other cases, both prior and subsequent, arrestment has been sustained as a ground of jurisdiction in actions against executors (a).

Court of Session has jurisdiction in Trust cases either *in rem* or *in personam*.

In other cases, where the jurisdiction has been declined, it will be found that the *ratio decidendi* was, either that the action was premature (b), or that proceedings were already pending in the forum of administration, which was accordingly *deferred* to as being a *more convenient* forum for adjudicating upon the rights of the claimants (c). Although therefore we are aware that doubts have been entertained by many as to the authority of the Court of Session to call foreign trustees to account, we see no reason to alter the opinion expressed in a previous chapter (d), that the Court of Session has a universal equitable jurisdiction *in personam* as well as *in rem*; that is, wherever the trustee or the trust estate is liable to be brought within the sphere of its action upon any of the received grounds of jurisdiction (e).

Beneficiary's title to sue.

It seems to be sufficient, in point of title, that the pursuer of an action for the vindication of an equitable interest against trustees should be rationally capable of conducting a suit, although to certain effects subject to civil incapacity. Accordingly, it has been laid down by our institutional writers, and confirmed by decision,

Married Women.

(a) *M'Morine v. Cowie*, 16 Jan. 1845, 7 D. 270; *Campbell v. Rucker*, 2 Mar. 1809, Hume, 258; *Rigby v. Fletcher*, 18 Jan. 1833, 11 S. 256; *Ranken v. Stewart*, 29 Feb. 1840, 2 D. 717; *Innerarity v. Gilmore*, 7 Mar. 1840, 2 D. 843.

(b) *Carron Co. v. Stainton*, 27 Jan. 1857, 19 D. 318; *Preston's case* and *Young's case*, *supra*.

(c) *Wilmot v. Wilmot*, 6 Mar. 1841, 3 D. 815; *Tulloch v. Williams*, 6 Mar. 1846, 8 D. 657; *Hawkins v. Wedderburn*, 9 Mar. 1842, 4 D. 924; *Fordyce v. Bridges*, 2 June 1842, 4 D.

1934; but see *Macmaster v. Dickson*, 17 June 1834, 12 S. 731.

(d) Chapter IX. (I. 160.)

(e) See also *Blackett v. Gilchrist*, 29 May 1832, 10 S. 590; *Peters v. Martin*, 21 June 1825, 4 S. 107; *Munro v. Grahame*, 4 July 1839, 1 D. 1151; *Cruikshank v. Cruikshank's Trs.*, 24 Feb. 1843, 5 D. 733; *affd.* on another point, 4 Bell, 179; *Mags. of Wick v. Forbes*, 11 Dec. 1849, 12 D. 299; *Kirkpatrick v. Irvine*, 23 June 1838, 16 S. 1200; *Forbes v. Forbes*, 14 Feb. 1852, 14 D. 498.

that a married woman may sue for the enforcement of the stipulations in her favour contained in her marriage-contract without the concurrence of her husband, more especially if the husband refuses his consent (a). In *Blair v. Burns* (b), which was an action by a married woman in her own name against the creditors of her ancestor for count and reckoning in relation to her succession, it was objected that she had no title to sue, as her husband declined to lend his instance to the action. The Court appointed a curator *ad litem*, and found that she was entitled, with his concurrence, to insist in the action to the effect of recovering the subject of the inheritance or its surrogatum. In a subsequent case (c), which is a more direct authority on the point, a married lady, living in family with her husband, was held entitled to sue the trustees of her mother's settlement in her own name for loss arising from the fault of their professional advisers, in investing the trust funds upon insufficient security. In *Wishart v. Wishart* (d), the House of Lords, agreeing on the point with the Court of Session, sustained the title of a widow to sue for her conventional provisions without the concurrence of the marriage-contract trustees. There can be no doubt that the administrative jurisdiction of the Court may be put in motion by a married woman presenting an application in her own name in relation to her own estate (e).

The curator or administrator-in-law of a minor is, in right of his office, entitled to concur with the minor in all actions necessary for the protection of the interests of his ward; and the same power belongs to the tutor or other guardian of a pupil or insane person suing in his own name (f). But whether a guardian or administrator-in-law be entitled to insist for payment of his ward's

Minors and
their Curators.

(a) Ersk. 1, 6, 21; *Marshall v. Marshall*, 1623, M. 6036; *Hacket v. Gordon*, 1673, M. 6039; *Byers v. Husband's Crs.*, 1708, M. 6045; *Scott v. Paton*, 1708, M. 6050; *Macpherson v. Mackintosh*, 1773, M. 6052.

(b) *Blair v. Burns*, 17 Dec. 1829, 8 S. 264.

(c) *Graham v. Stewart*, 4 Mar. 1831, 9 S. 543.

(d) *Wishart v. Wishart*, 12 May

1837, 2 S. & M'L. 564; see 7 D. 125. On the other hand, the discharge of a married woman, granted *stante matrimonio*, will not exonerate the trustees if the money were paid to the husband (*Mayne v. M'Keand*, 4 June 1835, 13 S. 870).

(e) *Pet. Primrose*, 9 Mar. 1850, 12 D. 917.

(f) See the subject treated in *Fraser, Persl. and Dom. Rel.* II. 195-200, and II. 212.

share of a trust succession, is a question which does not wholly depend upon the authority of the guardian, but upon the intention of the settlor. If the power of the legal guardians in relation to the trust estate is not excluded (as it may be, either by appointing the trustees curators of the succession, or by directing them to hold the estate until the majority or marriage of the beneficiaries), it would seem that the trustees may with propriety pay over the share of a minor beneficiary to the curator or administrator-in-law, provided his circumstances are such as to leave no doubt as to his responsibility, or that the responsibility is guaranteed by a cautioner. Trustees paying to a curator who has not found caution for the discharge of the duties of his office, incur personal responsibility in the event of the fund being lost (a). It may be doubted whether the trustees would not be entitled to require additional security before paying over to a curator any funds considerably in excess of the amount for which caution was found at his appointment.

Dumbreck v. Stevenson.

In *Dumbreck v. Stevenson* (b), the House of Lords, recognising the authority of the older cases, held that trustees were justified in paying over a minor's share of succession to his father as administrator-in-law, upon the security of two responsible cautioners; and an opinion was expressed by Lord Campbell, that although the poverty of the father was not a sufficient ground for refusing payment or requiring caution, yet where there was embarrassment of circumstances the trustees would not be justified in making payment without security (c).

Trustees vested with a discretionary power are not bound to denude in favour of the Curator.

Where, by the terms of a trust deed, a discretionary power was given to trustees of applying trust money for the maintenance or benefit of a person under curatory who was already sufficiently provided for, it was held that the trustees were entitled to retain the money as a guarantee fund, and they were accordingly assoilzied from the conclusions of an action for payment at the instance of the curator (d).

Deaf and dumb persons.

A deaf and dumb person, being *sui juris*, is, like any other

(a) *Donaldson v. Kennedy*, 18 June 16311; *Graham v. Duff*, 1794, M. 16383, 11 S. 740.

(b) *Dumbreck v. Stevenson*, 11 Feb. 1861, 4 Macq. 86; affg. 19 D. 462; *Wilkie v. L. of Dalziel*, 1688, M. 16383.

(c) 4 Macq. 87; *Govan v. Richardson*, 1633, M. 16263.

(d) *Moncrieff v. Usher*, 15 Nov. 1861, 24 D. 49.

beneficiary, entitled to require trustees holding property for his behoof to denude on the arrival of the period of distribution (a).

Creditors entering appearance in a multiplepointing as claimants of a riding interest in their debtor's trust money, are entitled to have decree of preference pronounced in their own name, notwithstanding that the trustee of their interest has been made a party to the process (b). A claimant in an action of distribution, who has been found entitled to a share of a fund *in medio*, may insist in the action without a mandatory, notwithstanding his absence from the country, if the share of the fund to which he has been found entitled be sufficient to cover expenses (c). Creditors.
Mandatories.

Next, as to the kind of action by means of which the beneficiary may establish his claim. It is settled that the Court will not dispose of a question as to the right of a beneficiary in a summary application, *e.g.*, for the appointment of a factor (d). But an agent employed to uplift a specific fund may be compelled, by summary petition in the Inferior Courts, to make delivery of the proceeds to his constituent (e). A multiplepointing is of course the appropriate form of action for trying any question resolving into a competition for funds in the hands of the trustee (f). But if the question lie wholly between the trustee and the beneficiary, raising an issue either upon the constitution of the trust or of the right claimed (g), or as to the existence of free estate (h), or of personal liability (i) on the part of the trustee, an action of multiplepointing at the instance of the beneficiary would seem to be incompetent, as in these cases there is, properly speaking, no double distress. A question Form of action
for trying
questions of
right.

Multiplepoint-
ing.

(a) *Craigie v. Gordon*, 17 June 1837, 15 S. 1157. And see *Pet. Kirkpatrick*, 8 June 1853, 15 D. 734.

(b) *Macfarlane v. Cranstoun*, 12 Dec. 1833, 2 S. 578; *Stainton v. Stainton's Trs.*, 25 Jan. 1850, 12 D. 572, as to the rights of a marriage-contract creditor.

(c) *Buik v. Patullo*, 3 Mar. 1855, 17 D. 568.

(d) *Harvey v. Lacy*, 7 July 1836, 14 S. 1112.

(e) *Graham v. Lang*, 20 Feb. 1850, 12 D. 754.

(f) See *Union Bank v. Ferguson*, 19 Feb. 1857, 19 D. 482.

(g) *Middleton v. Mitchell*, 21 Dec. 1843, 6 D. 316; *Moncrieff v. Bethune*, 1 June 1844, 6 D. 1100; *Croat v. Lord Panmure*, 8 June 1853, 15 D. 737; *Lord Gray v. Paterson*, 1 Dec. 1854, 17 D. 117.

(h) *Frier v. Western Bank*, *infra*.

(i) For example, questions as to the exercise of a discretionary power cannot be raised in the form of a multiplepointing (*Gregorson v. Macdonald*, 14 Feb. 1842, 4 D. 678). See *Carmichael v. Todd*, 2 Mar. 1853, 15 D. 473.

Count and
Reckoning.

of right between beneficiaries and trustees is, in general, most conveniently raised by a declarator of trust. Count and reckoning is the appropriate form when the trustee denies the existence of available funds (a); and questions of liability may be tried either in the form of a count and reckoning or in a petitory action concluding for damages, or for specific payment, if a legacy or liquid debt is claimed (b). The Court will not entertain an action to determine a future and contingent right (c), or to try by anticipation the validity of an attempted exercise of a power of disposal (d). It has been said that the denial of the beneficiary's right by the parties in possession of the property, gives the beneficiary a title to have that right declared (e); but this seems to be too strongly stated: it is only when something is done or threatened, that may interfere with his contingent interest, that the beneficiary is entitled to ask the Court to take cognizance of it.

A legatee or equitable disponee is entitled to constitute his claim against the estate by decree, although there may be a deficiency of free funds, or that the title is under challenge (f).

Remedy in
the event of
a Trustee
refusing to
invest.

The trustee of a continuing trust may of course be ordained to invest money in terms of the settlement (g); but as such a decree cannot be specifically enforced by diligence, the beneficiaries' remedy, in case of refusal, is by an application to the Court for the removal of the trustee and the appointment of a judicial factor. Questions as to the liability of parties to marriage-contracts, e.g., under an obligation to invest, are sometimes raised by means of a charge given upon the clause of registration. But the Court will not encourage resort to such a summary mode of redress where there is any *bona fide* question, whether of law or fact, in the case (h).

(a) *Frier v. Western Bank*, 19 Feb. 1855, 18 D. 272.

(b) See *Carron Co. v. Stainton*, 27 Jan. and 27 June 1857, 19 D. 318, 932; *Home v. Menzies*, 10 July 1845, 7 D. 1010. If the action is against a cautioner of the trustee, negligence on the part of co-trustees or commissioners is not a relevant defence (*Biggar v. Wright*, 19 Nov. 1846, 9 D. 78).

(c) *Baillie v. Seton*, 16 Dec. 1853, 16 D. 216; *Ferrie v. Ferrie*, 23 Feb. 1849, 11 D. 704.

(d) *Harvey v. Harvey's Trs.*, 28 June 1860, 22 D. 1310.

(e) *Mackenzie v. Hanbury*, 1 July 1846, 8 D. 964; and see *Provan v. Provan*, 14 June 1840, 2 D. 298.

(f) *Bazett & Co. v. Heugh's Trs.*, 29 Nov. 1826, 5 S. 50; *Mure v. Gilmour*, 23 May 1851, 13 D. 986.

(g) *Forsyth v. Kilgour*, 13 Dec. 1854, 17 D. 207.

(h) See *Muir v. Mackersy*, 21 Dec. 1853, 16 D. 289.

An executor-at-law, who may be regarded as combining the characters of trustee and beneficiary, has of course the right of calling his co-executors to account in an action of distribution. He has also a direct action against the debtors to the executry estate for his own share of the assets (*a*).

Assumed trustees, although not personally responsible for the intromissions of their predecessors in the trust, are liable as trustees to render accounts embracing the management of their predecessors as well as their own (*b*), and are not entitled to a discharge until they have called their predecessors to account (*c*).

Responsibility
of assumed
Trustees.

Let us now consider the different defences which may be stated by trustees in answer to an action upon the trust. The most frequent grounds of defence are: (1) that there never was any available fund for division; (2) that the fund has been lost without fault on the part of the trustees; (3) that the provision has been paid to some other party supposed to have been in right of it; and, (4) that the estate has been wound up, and all claims upon it extinguished by prescription or lapse of time. The first of these defences raises an issue of accounting depending upon matters of fact; the second raises the issue of personal liability, which we have elsewhere discussed. The defences founded upon *bona fide* payment to a wrong party, and *mora*, remain to be dealt with.

Defences to the
Beneficiary's
action.

The defence of *bona fides* assumes that the payment was made to a person erroneously supposed to be the creditor. The liability of trustees to pay to the real creditor is determined by the principle, that, on the one hand, error in law is not admitted as an excuse, while, on the other hand, a *bona fide* payment to a person supposed to be in fact the creditor, may be excusable if the debtor had not the means of discovering the error. For example, payment to a party confirmed as nearest of kin, but who in point of fact was not the nearest of kin, has been sustained in respect of the evidence afforded by the title of confirmation (*d*). And on the same principle, a purchaser at a judicial sale has been held justified in paying

Bona fide pay-
ment.

(*a*) See Vol. I., pp. 234-5.

(*b*) *Sommerville's Trs. v. Wemess*, 8 Dec. 1854, 17 D. 151.

(*c*) *Nicol v. Wilson*, 10 June 1856, 18 D. 1000.

(*d*) *Stewart v. Earl of Orkney*, 1713, M. 1796; *Paterson v. Paterson's Exrs.*, 1626, M. 1786; *Thomson v. Mowbray*, 1676, M. 1791. But see *Howes v. Goodlet Campbell*, 1758, M. 1799.

the price to creditors ranked preferably to the pursuer, under an error in fact (a). But payment to a widow, unconfirmed, of her legal provisions, is not a sufficient defence to an action at the instance of executors; and conversely, if a trustee apply the rents of an estate forming heritable succession in payment of the claims of creditors, instead of selling a portion of the lands, he is liable in an action at the instance of the widow for the value of her terce, reserving his right of relief against the heir (b). On the same principle, where trustees had paid a portion of the sum due under a moveable bond to the creditor's widow, believing it to be heritable as to succession (although by statute 1661, chap. 32, such bonds remain heritable as to the interests of husband and wife), the husband's representative, suing nearly forty years after the succession opened, was held entitled to repetition (c).

Payment
under errors
in fact.

The principle that reasonable evidence on a matter of fact is sufficient to protect trustees against a claim for repetition, is illustrated by the case of *Bruce v. Robson* (d), where trustees of a settlement, under which the truster's son had right to a share of the succession, paid a debt of L.100, due by the son, out of the funds supposed to belong to him in virtue of the settlement. The son had disappeared four months before the truster's death, and was not again heard of. Twelve years after, an action was raised by the truster's next of kin as resulting beneficiaries, in which it was agreed by all the claimants that the distribution should take place on the footing that the truster's son had predeceased him; and in the accounting the next of kin claimed repayment of the sum of L.100, on the ground that the succession had never vested in the son. But the Court were unanimously of opinion, that as the debt was paid before the presumption for life had been overcome, the trustees were entitled to take credit for the payment.

When Trustees
are liable
for erroneous
payments.

In another class of cases, where payments or conveyances have been made by trustees under circumstances tantamount to a devolution of the trust,—as, for example, where trustees have conveyed estate to a husband, which they were bound to secure to the wife,

(a) *Mackie v. Dunbar*, 1628, M. 1788.

(b) *Cowan v. Kerr*, 15 Dec. 1830, 9 S. 188.

(c) *Gray v. Walker*, 11 Mar. 1859, 21 D. 709.

(d) *Bruce v. Robson*, 25 Feb. 1834, 12 S. 486.

exclusive of the *jus mariti* (a); or have conveyed to the truster, or to a trustee for his creditors, without securing the interests of preferable creditors or beneficiaries,—the Court have held the trustees responsible for the breach of trust (b). And so, if a trustee holding personal estate, upon trust to entail the residue after payment of the truster's debts and legacies, execute an entail in pursuance of his powers, without reserving a sufficient sum for satisfaction of the truster's obligations, the personal creditors or legatees have direct recourse against the trustee in consequence of the breach of trust (c).

But if trustees merely *invest* money in name of the wrong party, retaining the securities in their hands, as the fund is still within their control, the mistake may be rectified at the sight of the Court, matters being still entire (d).

Error as to investment may be corrected.

It remains to be considered, under what circumstances and in what manner the beneficiary's right of action may be extinguished by lapse of time. Like all other rights, a beneficial interest may be lost by adverse possession for the prescriptive period of forty years (e); but the possession of the trustees is not adverse possession, because it is possession upon the title on which the beneficiary claims, and for his behoof. But if the fund have been actually distributed or paid away, the right of action against the trustee may, of course, be cut off by the negative prescription; and the only question that can arise in such cases, is as to the period from which prescription runs.

Prescription of Beneficiary's right of action after funds have been paid away.

On this point the cases of *Barns v. Barns' Trustees*, and the *Earl of Eglinton's* case, decided by Lord Jerviswoode in 1861, are instructive (f). The circumstances were as follows:—In the first case, the truster, who died in 1791, had directed his trustees to invest the free residue of his estate in land, to be entailed upon

From what period prescription runs.

(a) *Mayne v. M'Keand*, 4 June 1835, 13 S. 870; *Ross v. Allan's Trs.*, 13 Nov. 1850, 13 D. 44. See the subject more fully treated in Chapter XXVI.

(b) See *Freen v. Beveridge*, 28 June 1832, 10 S. 727, 12 S. 141; *Mackenzie v. Thomson*, 12 Nov. 1846, 9 D. 35. But see *Jeffrey v. Ure*, 21 June 1825, 1 W. & S. 565.

(c) *Cruikshank v. Cruikshank*, 24

April 1845, 4 Bell, 179; *Fraser v. Fraser*, 8 Dec. 1826, 5 S. 104.

(d) *Buik v. Patullo*, 6 June 1854, 17 D. 44.

(e) See the statutes 1469, cap. 28; 1474, cap. 54; and 1617, cap. 12.

(f) *Barns v. Barns' Trs.*, 5 Mar. 1857, 19 D. 626; *Earl of Eglinton v. Earl of Eglinton & Ors.*, 28 Mar. 1861, 23 D. 1369.

certain conditions. Having realized the trust funds, the trustees, with concurrence of the then beneficiaries, purchased an estate, the price of which exceeded the amount of the funds by L.4000; and in order to provide for payment of the balance of the price, they retained the estate in their hands, paying over the surplus rents to the heirs of entail from time to time, but without rendering any detailed account of their intromissions, or denuding of the estate. In 1853, being more than forty years after the completion of the purchase by payment of the first instalment of the price, an action of accounting and payment was raised by the beneficiaries, in which the purchase was challenged as being in excess of the powers conferred by the settlement. The trustees admitted their liability to account, but pleaded the negative prescription in bar of any objections to the purchase. The First Division, by a majority, sustained the plea of prescription, on the ground that the transaction was known to the beneficiaries, and that their acquiescence for forty years brought the case within the ordinary rule by which competing titles are cut off through the operation of the long prescription. In the *Earl of Eglinton's case* (a), the question arose in the form of a defence to an action concluding that the proprietor of an entailed estate was entitled to acquire the property in fee-simple; the ground of defence being, that whereas the trustees had been directed to execute a valid deed of entail of a certain estate, they had executed an entail which was defective in one of the statutory prohibitions. The pursuer pleaded that the estate had been possessed by himself and his ancestors for more than forty years upon the defective entail; and his possession under that title was held to have the effect of cutting off any right of action in the heirs-substitute to compel the heir in possession or the representatives of the trustees to execute a valid entail in terms of the truster's directions (b).

Trustees cannot plead prescription on their own possession against the Beneficiary.

It will be observed that in both the leading cases the question at issue substantially resolved into a competition between claimants having opposing interests in the succession; and the practical result of the decisions is, that trustees who have denuded of the estate

(a) 23 D. 1369.

(b) See the cases of *Weir v. Steele*, 1745, M. 11359; *Pollock v. Porterfield*, 10 Mar. 1779, 2 Paton, 495, affg. M. 10702; *Kinloch v. Rocheid*, 1800,

M. Prescrip. Nos. 4 & 7; *Paul v. Reid*, 8 Feb. 1814, F. C.; and *Lindsay v. Balgonie*, 1627, M. 10718, where prescription was held to apply to a claim under a testament.

committed to their charge, are relieved, by the operation of the negative prescription, from liability by reason of error in the execution of the duty of distribution. But, as we have already explained, it is not therefore to be inferred that trustees retaining the trust estate in their *own hands* would be in a position to plead the negative prescription in defence to an action of denuding. In the class of cases already adverted to, the foundation of the plea of prescription was a beneficial conveyance to a third party. In this class of cases it will be observed that the trustees are themselves barred by prescription from claiming relief from their donee; and it would not be consonant to equity that a beneficiary who had allowed prescription to run upon the trustee's right of indemnity should be permitted to enforce *his* right by a personal action against the trustee. But there can be no *equitable* exception to a claim directed against trustees for the payment of funds retained in their own hands; and as their title of possession is in its own nature a qualified title, it appears to us that prescription could never be pleaded upon such a title in answer to a beneficiary whose claim is not adverse to the trustee's title, but founded upon it. This principle appears to have been recognised in *Ogilvy v. Erskine* (a), though the decision turned partly on the feudal doctrine, that where a party possesses on two titles, both unlimited (*i.e.*, fee-simple titles with destinations over), prescription does not run in favour of the destination in the conveyance upon which his title is made up, and against the destination in the other title.

Such appears to have been the opinion of the judges who decided the case of *Barns v. Barns' Trustees*; for, while supporting the specific purchase in respect of the title, which was by the negative prescription secured to the heirs of the investiture, their Lordships were at pains to explain (b) that they did not discover, either in principle or in the authority of the case of *Kinloch v. Rocheid*, founded upon by the defenders, any reason for extending the operation of the negative prescription to a claim of general accounting

Cases on prescription under a subsisting trust.

(a) *Ogilvy v. Erskine*, 26 May 1837, 15 S. 1027. This case is not noticed in Mr Ross's cases, though it must certainly be regarded as a leading

authority in the law of prescription on double titles.

(b) See the opinion of the Lord President (Lord Colonsay), 19 D. 637, and of Lord Deas, 651.

directed against the trustees of a *subsisting trust* (a). It remains to be seen in what sense the expression "subsisting trust" will be construed with reference to claims of the nature here referred to. We incline to think that, notwithstanding the elapse of the period appointed by the settlor for the execution of his declared purposes, the trust must be held to subsist where the trustees have funds in their hands, and the trust purposes in relation to those funds remain unexecuted.

Prescription
may be barred
by Trustee's
acknowledg-
ment.

In any view of the effect of the law of prescription, it is obvious that the trustees of an unexecuted purpose are entitled to protect the beneficial interest from prescription by executing an acknowledgment of the trust. Such an acknowledgment is necessarily binding upon the trustee and his heirs, and no other party can have any interest to object to it. On this ground the Second Division, in the case of *Briggs v. Swan's Executors* (b), unanimously repelled a claim, at the instance of the next of kin of a deceased trustee, for repetition of a sum paid by his executors to the beneficiaries after prescription had run upon the trust. The executors had acknowledged their liability, as his representatives, to account to the beneficiaries, in the state of accounts rendered to the Board of Inland Revenue with reference to the legacy duty exigible from the estate of the deceased trustee; and this acknowledgment was held equivalent to a declarator of trust.

Mora and
taciturnity.

The principles which determine the applicability of the plea of *mora* and taciturnity to actions against trustees, are similar to those which have been the subject of consideration in connection with the law of prescription. If a legatee lie by for any length of time, and allow the trustee to distribute the funds amongst other parties, or to contract debt on the security of the estate (c), without giving

(a) The case of *Baird & Others v. Mags. of Dundee*, 5 Feb. 1862, 24 D. 447, does not seem to invalidate the proposition stated in the text. The question there was as to the right to compel the Magistrates of Dundee, as trustees of a charitable endowment, to replace funds which had been diverted from their purpose in the 17th century. The Court held, that as the property had been conveyed to a different body,

namely, the Magistrates and Town Council, the original trust was at an end, and that the title of the corporation was fortified by the negative prescription. The case is therefore analogous in principle to the cases of *Barns* and *Earl of Eglinton*, already commented on.

(b) *Briggs v. Swan's Exrs.*, 24 Jan. 1854, 16 D. 385.

(c) *Galloway v. Grant*, 21 Feb. 1851, 13 D. 756.

notice of his claim, he is justly held to have lost his recourse against the trustee by neglecting to insist for his interest at a time when the estate (which, in a sense, may be said to be primarily liable for the fulfilment of the trust purposes) might have been made available to him. This was the principle of the cases of *Munro* and *Cullen v. Wemyss* (a), and the earlier cases (b). But it is plain that taciturnity is not pleadable in bar of the beneficiary's claim, where his case is founded either on the fact of the trustees having funds in their possession (c), or that he himself was previously unaware of the provisions of the trust under which his right has arisen (d).

Although an action for a breach of trust may undoubtedly be barred by taciturnity for such a length of time, and with such a full knowledge of the circumstances, as amount to homologation of the illegal transaction, yet a discharge of the trustee from liabilities of this kind is not so easily implied as a discharge of an action for debt, which is the character of an action by a legatee against the executor. For example, in actions of reduction of purchases of the trust property by trustees, it has been repeatedly held that mere lapse of time will not exclude the beneficiary's right to redress (e).

Homologation
of breach of
trust not
readily im-
plied.

(a) *Cullen v. Wemyss*, 16 Nov. 1838, 1 D. 32; *Munro v. Munro*, 17 Dec. 1825, 4 S. 328; here an heir, who had acknowledged the right of trustees by possessing a farm for several years on a missive from them, was held to be barred from claiming the lease in his character of heir. See also *Urquhart v. Urquhart*, 14 July 1853, 1 M'Q. 658, 13 D. 742, and a recent case in the Second Division, *Milligan v. Walker*, 7 March 1862, where considerable weight was given to the plea of taciturnity and lapse of time.

(b) See *Thomson v. Murray*, 19 Nov. 1824, 3 S. 297; *Scott v. Mitchell*,

27 May 1830, 8 S. 820; *Todd v. Beattie*, 12 Nov. 1802, Hume, 487; *Darling v. Darling*, 17 Feb. 1802, F. C.; *Wilson v. Wilson*, 1788, M. 11646.

(c) *Seath v. Taylor*, 21 Jan. 1848, 10 D. 377.

(d) *Allan v. Allan's Trs.*, 24 June 1851, 13 D. 1220. And see *Gray v. Walker*, 11 Mar. 1859, 21 D. 709.

(e) *York Buildings Co. v. Mackenzie*, 13 May 1795, 3 Paton, 378; *Jeffrey v. Aiken*, 16 June 1826, 4 S. 722; *Taylor v. Watson*, 20 Jan. 1846, 8 D. 400; *Gillies v. M'Lachlan*, 11 Feb. 1846, 8 D. 487.

CHAPTER XXX.

OF THE TRANSMISSION OF EQUITABLE INTERESTS BY DEED OR BY OPERATION OF LAW.

THE subject to be discussed in this chapter is the transmission of the beneficial or equitable interest, while the formal title remains vested in the trustee. Such transmission may be effected, first, by the act of the party, who may assign or dispose of his interest, whether that be a right to a specific subject vested in trustees for his behoof, or a right to a share in the distribution of a trust estate. Again, an equitable interest may be transferred by operation of law; for example, by any of the legal assignments, or by descent, if the beneficiary dies intestate; or it may be attached by diligence. In the discussion of the subject, the following arrangement will be observed: we shall treat, *first*, of assignment; *secondly*, of testamentary disposition; *thirdly*, of descent; and, *fourthly*, of diligence.

SECTION I.

ASSIGNMENT AND DISPOSITION OF EQUITABLE INTERESTS BY DEED INTER VIVOS (a).

The questions that require to be noticed relate, *first*, to the assignable quality of the equitable interest; and, *secondly*, to the effect of intimation, and to questions of priority.

I. *Of the Assignable Quality of the Equitable Interest.*

Vested in-
terests are
transmissible.

It is a general rule of law, that any vested interest, although not in the possession of the beneficiary, is capable of being transmitted

(a) The English authorities on the assignable character of equitable estates are digested in Tudor's *Leading Cases*, II. 615 *et seq.*; but on a subject so

by assignment; or, if the interest is of a heritable nature, by disposition and assignation. Interests in trust estates are subject to the same rules with respect to the form of transmission as debts; and therefore a simple assignation not intimated will be effectual as an obligation against the cedent, though it will not divest him or secure a preference in a question with the subsequent assignee or arresting creditor (a). It would not be consistent with our plan to enter at length upon the formal requisites of assignation or disposition, and the completion of a title by intimation or its equipollents. It is sufficient to notice how, and in what manner, the assignable quality of the beneficiary's interest may be affected by the trust.

by assignation,
or disposition
and assigna-
tion.

A *spes successionis* or contingent right may be assigned, but the assignment will be operative only after the right has vested (b). If, on the contrary, the interest lapses by the predecease of the legatee or the failure of the contingency, no right passes (c). In a large proportion of the cases on vesting which are noticed in a subsequent chapter, the question at issue was, whether the equitable interest had vested so as to be carried by a previous assignation or testamentary disposition.

Effect of
assignment
of a *spes suc-
cessionis*.

In a destination of a legacy to a legatee, his heirs and assignees, the term *assignees* is understood to apply to assignees of the vested interest; and therefore, if the legatee predecease the testator, the legacy will not go to the executor of his will, but to the heir or next of kin, according to the nature of the subject (d). And the same rule obtains in regard to the execution of powers of disposal of equitable interests. A deed of disposal by a party who has merely a possibility of obtaining the power, will be effectual if the power afterwards vests, but not otherwise (e). An agreement to sell an interest which is not vested has the same effect as an assignation of the interest in a question with the cedent.

Construction of
term Assignee
in a substitu-
tion.

closely connected with a merely technical branch of law, conveyancing, it would be idle to seek for illustrations out of the sphere of our own law.

(a) See, for example, *Maxwell v. Wyllie*, 25 May 1837, 15 S. 1005; *Forbes v. Luckie*, 26 Jan. 1838, 16 S. 374; *Wilson v. Wilson*, 9 July 1842, 4 D. 1503.

(b) See *Wood v. Begbie, etc.*, 17 June 1850, 12 D. 963.

(c) See for example the cases cited, *infra*, note (d).

(d) *Wilkie v. Wilkie*, 27 Jan. 1837, 15 S. 430; *Bell v. Cheape*, 21 May 1845, 7 D. 614; see also *Robertson v. Pattinson*, 13 Aug. 1846, 5 Bell, 259.

(e) See this subject noticed, *infra*, p. 125, note (b).

Effect of
assignment
of an interest
which is vested,
but not imme-
diately pay-
able.

An assignation of an interest which has vested, but which cannot be realized until the occurrence of a future event, takes effect immediately. If followed by intimation, it divests the cedent of the entire personal right; and even though not intimated, it is effectual as an agreement to convey his entire interest, including subsequent accessions. For example, if the legatee of the reversion of a fund which is burdened with a liferent, assign his interest, no questions can afterwards be raised as to the value of the interest at the time of the assignation; for the thing that was assigned was the right as it stood in the cedent, whether of fixed amount, indefinite, or unascertained (a).

Personal right
to lands can
only be trans-
ferred by dis-
positive words.

It is to be observed that, although a disponee of lands may transfer his personal *title* to another by merely assigning the disposition, yet a party who has a personal *right* to heritable property, *e.g.*, a right to demand a specific conveyance of heritable subjects from the trustee, can only convey it effectually by using dispositive words. When, therefore, a conveyance of an equitable interest in property consisting partly of heritage is contemplated, it will be proper in all cases to introduce the words "dispone and assign," unless the parties to the transaction are anxious to raise an interesting question as to the heritable or moveable nature of the interest (b).

Whether an
equitable
interest can be
entailed.

An equitable interest in lands and heritages can only be made the subject of an entail when the fee is, in the contemplation of law, in the person of the beneficiary; as, for example, where the proprietor of an estate has conveyed it to a trustee for payment of debts without disposing of the reversionary interest, in which case an entail may be effectually made of the reversionary estate by the granter of the trust or his heir-at-law, during the subsistence of the trust. The reports present many examples of the execution of deeds of entail and other dispositive settlements under such circumstances (c). If the fee of the estate is in the trustee, a dispositive

(a) *Pattinson v. Robertson*, 5 Mar. 1844, 6 D. 944; *Stainton v. Stainton's Trs.*, 25 Jan. 1850, 12 D. 572; *Mitchell v. Major*, 12 Nov. 1856, 19 D. 30.

(b) If the beneficiary convey the estate itself, supposing his title to be complete, the conveyance will be effec-

tual as an assignation of his equitable interest (*Paul v. Boyd's Tr.*, 22 May 1835, 13 S. 818).

(c) See *M' Millan v. Campbell*, 14 Aug. 1834, 7 W. & S. 441, affg. 9 S. 551; *Cunninghame v. M'Leod*, 13 Aug. 1846, 5 Bell, 210, affg. 3 D.

conveyance of the estate itself by a beneficiary would seem to be inappropriate, as he has only the right, and not the title of heritable proprietor. A disposition of the estate would, however, receive effect as a conveyance of the equitable interest (a). If this doctrine be correct, it follows that an entail executed by a party in right of the beneficial interest will be a good assignation to the institute or first taker; and it is thought that it ought on principle to be binding upon the first taker, as a trust, to execute an effectual entail of the feudal estate. Indeed, it might fairly be maintained, on the construction of the Entail Statute, that a disposition of the equitable interest, subject to the necessary prohibitions, was capable of receiving effect as a valid entail of the heritable interest under the trust, so that the heirs would not be *in titulo* to demand a conveyance from the trustees except under the conditions of an entail (b).

A liferenter (c) or joint owner (d) can only assign the precise interest that he himself has in the estate. On the death of the cedent, therefore, the interest will pass in the one case to the fiar, and in the other to the surviving joint owners.

Assignment
of life in-
terests.

As to assignations of equitable interests in personal property, no particular form is necessary. A bill of exchange drawn upon and presented to the trustees is a good assignment of the funds of the beneficiary in their hands (e). Professor Bell indicates an opinion, that the assignation of a bill or other debt due by the truster to the beneficiary does not give the assignee a right to dividends claimed from the trustee in a voluntary trust (f); and it has been settled that

Form of assign-
ation of equit-
able interests
in personalty.

1288; and other cases cited in Chapter XXXIII., *infra*.

(a) A beneficiary of property directed to be entailed, may burden the life interest with provisions in the same manner as if an estate had been actually purchased and conveyed to the heirs under the fetters of an entail; that is, assuming the period to have arrived at which the entail ought to have been executed (*Stainton v. Stainton's Trs.*, 25 Jan. 1850, 12 D. 571).

(b) See Lord Moncreiff's note in *M'Millan v. Campbell*, 4 Mar. 1831, 9 S. 554; and the cases of *Livingston* and *Denholm*, there referred to. No opinion was expressed in the House of

Lords as to the competency of entailing a personal right to heritable property according to the law of Scotland; but Lord Wyndford observed, that in similar circumstances a Court of Equity in England would compel the person in whom the legal estate was, to complete the conveyance (7 W. & S. 451).

(c) *Stewart's Trs. v. Stewart*, 20 Dec. 1851, 14 D. 298; see *Hamilton v. M'Gie*, 7 June 1828, 6 S. 932.

(d) *Robertson v. Menzies*, 10 Mar. 1857, 19 D. 671.

(e) *Watt's Trs.*, 21 Dec. 1853, 16 D. 279; *Fyfe's Trs.*, 20 Mar. 1862.

(f) Bell's Com. (6th Ed. 561).

dividends due under a sequestration are not carried by an assignation of the debt subsequent in date to the sequestration, the rule being that all diligence begun must be separately assigned.

Transmission
of equitable
interests by
legal assigna-
tions.

The legal assignations, as marriage, bankruptcy, and judicial assignations, are operative upon equitable interests, in the same manner as upon other personal rights. It has been settled by two concurring decisions, that the right of electing between legal and conventional provisions does not fall to creditors in bankruptcy, but that the Court possesses an equitable power of controlling the beneficiary's choice, so that it may not be exercised nimiously, to the prejudice of the creditors. Where the question was between creditors of a husband claiming the wife's legitim as falling under the *jus mariti*, and the wife herself claiming provisions of larger amount than the legitim given to herself, exclusive of the husband's *jus mariti*, the Court sustained the exercise of the power of election by the wife in her own favour (a). It has not yet been decided whether creditors can compel the donee of a general power to exercise it by conveying the property to a trustee for their behoof (b).

Election.

II. Of Intimation and the Completion of a Title to Equitable Interests.

Intimation
necessary to
divest the
Beneficiary.

A beneficiary may be divested of his equitable interest in personal property by intimation of the assignation in his favour to the trustees; and it would seem that intimation to a single trustee, or to a factor on the trust estate, may be sufficient to complete the assignee's title, though certainly not to put the other trustees in *mala fide*, in the event of their paying to a subsequent assignee (c). The title of the assignee to the subject being completed by intimation, it follows that his right is preferable to that of subsequent arresters claiming through the beneficiary.

Beneficiary
not divested of
the equitable
interest in
heritable prop-
erty until
infetment.

Equitable interests in heritable property stand in a somewhat different position. A disposition and assignation of a personal right to heritable estate, the title to which stands in the person of a trustee, does not communicate to the assignee a right capable of being completed by infetment. To complete his title, he must therefore either

(a) *Lawson v. Young*, 15 July 1854, 16 D. 1098; *Stevenson v. Hamilton*, 7 Dec. 1838, 1 D. 181.

(b) See the opinions in *Rollo v. Rollo*, 26 Jan. 1843, 5 D. 446.

(c) *E. of Aberdeen v. E. of March & Ors.*, 9 April 1730, Cr. & St. 44; *Stair*, 3, 1, 10; 4, 40, 33; *Ersk.* 3, 5, 5; *More's Notes*, BB., and cases there cited.

obtain a conveyance from the trustee or adjudge in implement of the assignation. It is not necessary, however, that the assignee of a beneficiary should have his title feudally complete in order to the acquisition of a preference. On the contrary, the intimation of an onerous disposition and assignation of the equitable interest in heritable estate, entitles the assignee to rank preferably to subsequent adjudging creditors (*a*). It would seem that even when the right is fully vested and the beneficiary is in a position to demand possession, an intimated assignation of his interest would give a preference in bankruptcy (*b*).

We have still to consider whether the assignee of an equitable proprietor is entitled in any circumstances to a preference over assignees of the trustee. This question is, by the maxim *assignatus utitur jure auctoris* (*c*), resolved into the more simple inquiry, whether the right of the beneficiary himself is liable to be defeated by the fraudulent assignment of the trustee. Here a distinction must be taken between declared and latent trusts. In the former class, which includes conveyances expressed to be in trust for purposes declared in a relative writing, the title of assignees of the trustee is measured by the terms of the whole settlement; and therefore, if the trustees have power to sell and assign, the assignees of the trustee are preferable; for the claim of the beneficiary then lies against the funds into which the property was converted. If the trustees have no power of disposal, but are bound to convey the estate specifically, then the purchaser from them may be ousted by the beneficiary or his assignee; for he can claim no higher title than his cedent. In the alternative case of a latent trust, that is, a trust constituted by *ex facie* absolute disposition—and it is immaterial whether the purposes are embodied in a back-bond or not,—a purchaser from the trustee is not affected by the conditions of the latent trust, and his right is therefore preferable to that of the beneficiary or his assignee (*d*). Purchasers from trustees, therefore, stand

Questions of preference between Assignees of Beneficiary and of Trustee.

Express trusts.

Latent trusts.

(*a*) *Russell v. Macdowall*, 6 Feb. 1824, F. C.; *Morrice v. Sprot*, 27 June 1846, 8 D. 918.

(*b*) See *Paul v. Boyd's Trs.*, 22 May 1835, 13 S. 818.

(*c*) The word *jus* here, must be understood in the sense of title as distinguished from right. An onerous

assignee takes the right of the cedent as it stands on the face of his title; subject, however (and this is the only exception), to counter claims on the part of the debtor, whose rights, of course, are not to be frustrated by the act of his creditor.

(*d*) *Somervilles v. Redfearn*, 1 June

in a better position than creditors using diligence, who can only take the personal right which is the subject of the diligence, as it stands in the person of the debtor (a). This is equivalent to saying, in the case of a trust, that the estate cannot be operated upon by diligence at the instance of creditors of the trustee, as distinguished from those of the estate, except where the estate is vested in the person of the trustee by infestment upon an *ex facie* absolute title.

SECTION II.

TESTAMENTARY DISPOSITION OF EQUITABLE INTERESTS.

Distinction as to transmission of equitable interests in real and personal estate.

Equitable interests of personal property are transmissible by will; of heritable property, by *mortis causa* disposition (b). Under the expression *personal property*, we mean to include all rights which are personal as to succession, including interests in land directed to be sold with a view to division; and conversely, it is to be understood that heritable interests as to succession in moveable estate—*e.g.*, personal bonds to heirs secluding executors, and money given to trustees upon trust to purchase land—can only be transferred by the dispositive form of conveyance (c). There may be some room for doubt as to the latter point, but the conveyancer would not be justified in assuming that a testamentary instrument would carry an interest in money directed to be invested in land for the benefit of the testator (d).

1813, 5 Paton, 707; *Burns v. Lawrie*, 7 July 1840, 2 D. 1348. See also *M'Clelland v. Bank of Scotland*, 27 Feb. 1857, 19 D. 574.

(a) *Gordon v. Cheyne*, 5 Feb. 1824, 2 S. 675, and F. C.; *Dingwall v. M'Combie*, 6 June 1822, 1 S. 463.

(b) See the vesting cases in Chapters XLIII. and XLIV.; for example, *Wilson v. Wilson*, 9 July 1842, 4 D. 1503.

(c) The character of the succession is, of course, not affected by any unauthorized act on the part of the trustee (*Berford v. Brown*, 1 June 1832, 10 S. 609).

(d) We assume, of course, that the direction is of a nature to operate a conversion of the estate as to succession in the event of the equitable owner dying intestate. The general opinion is, that the heir can only be deprived of his right of inheritance, whatever the subject of inheritance may be, by a dispositive conveyance. A mere direction to invest trust funds upon heritable security does not convert the property. See this subject fully discussed in Chapter XXXI., on the doctrine of Constructive Conversion, *infra*, pp. 152, 154.

A general settlement of all the disponent's means and estate carries his interest subsequently acquired in a trust fund ; and in like manner a universal legacy carries equitable interests in moveable property, whether vested at the date of the testament or subsequently acquired (a). The decisions have gone considerably further ; for it has been decided, and must now be taken as law, that a general testamentary settlement executed before the acquisition of a power of disposal is to be regarded as an exercise of the power of disposal in favour of the beneficiaries of the settlement (b).

Equitable interests carried by a general disposition.

A beneficiary under a contingent destination may with propriety dispose of his interest in the succession by will. If the fee ultimately vests in him, the settlement will be effectual ; if it is carried over by the survivance of a substituted heir or joint proprietor, the bequest is of course ineffectual as regards that interest.

Contingent interests may be disposed of by will.

As to the capacity to test, there does not seem to be any distinction between equitable and legal estates. It is understood that a married woman may dispose *intuitu mortis* of her interest in heritable property vested in trustees for her use, although the husband's rights are not excluded. A minor may dispose of his equitable interest in moveable property, since he has the *testamenti factio*. But he cannot dispose of an equitable interest in heritable property, to the disappointment of his heir-at-law, any more than he could dispose of the estate itself. In practice, it is common for testators to prevent their minor children testing on their interests in the succession by limiting a substitution to the survivors in the event of any of the children dying in minority.

Capacity to test.

(a) *Baine v. Craig*, 8 June 1845, 7 D. 845 ; *Ramsay v. Lady White*, 26 June 1832, 11 S. 786 ; *Fyffe v. Fyffe*, 13 July 1841, 13 D. 1205.

(b) See Chapter XXII., Section II. (Powers of Disposal), I., p. 506, where the effect of a testamentary exercise of a power is fully discussed. If the

donee of the power predecease the settlor, of course no right vests in him, and his testament is therefore ineffectual as an exercise of the power (*Henry v. Grant*, 19 Feb. 1824, 2 S. 605). The same result will follow from the revocation of the power (*Currie v. Currie*, 22 Jan. 1835, 13 S. 290).

SECTION III.

DESCENT OF THE EQUITABLE INTERESTS.

General rules of succession applicable to equitable interests.

Equitable interests descend to the legal representatives of the beneficiary in the event of his dying intestate,—heritable interests passing to the heir, moveable interests to the personal representatives, according to the threefold division recognised in the law of Scotland (a). There can be no *terce* or *courtesy* of an equitable interest, as those rights only attach to property in which the deceased died *infeft*.

Character of the succession affected by intention.

The character of the succession to a trust estate does not depend altogether, as in the case of property of which the deceased has the title as well as the interest, upon the nature of the subjects, but depends much more frequently upon the character which the trustor intended it should take at the period of distribution. If there be no direction to convert, the character of the succession will of course follow that of the property. The subject of constructive conversion has been reserved for discussion in a separate chapter.

When equitable interests in heritage are conquest.

An equitable interest in heritage will necessarily fall to the heir of conquest, unless the deceased beneficiary would have succeeded to the property as heir of the settlor; “for,” says Professor Bell, “conquest is what has come into the person of the deceased by purchase, gift, or other singular title, from a stranger, or from one to whom he would not by law have succeeded” (b).

Right of conditional institute vests without service or confirmation.

The right to the heritable and moveable succession vests in the beneficiaries named or conditionally instituted in the trust settlement, without service or confirmation; so that the heirs or next of kin of those parties may complete a title to their interest in the trust estate, and require the trustees to denude in their favour (c). As regards moveable succession, the right of inheritance will again transmit to representatives, although the next of kin of the parties originally instituted may have died without confirming (d).

Equitable interests transmit to personal representatives without confirmation.

(a) See, for example, *Graham v. Graham*, 31 May 1834, 12 S. 664, where a succession to an equitable interest under a trust estate was divided into *legitim*, *jus relictæ*, and *dead's-part*.

(b) Bell's Com. (6th Ed.) 1028.

(c) *Gordon's Tr. v. Harper*, 4 Dec. 1821, F. C. and 1 S. 185; *Broughton v. Fraser*, 3 Mar. 1832, 10 S. 418.

(d) This result follows from the

The rule is different in the case of heritable succession. The express conveyance in the trust deed is sufficient to give a vested interest to the parties named or designated in it, who succeed accordingly, not as heirs, but as donees of the equitable interest. But service is necessary to give a vested interest to parties claiming as the heirs-at-law of a deceased beneficiary. The trustee is not bound to convey to the heir of a beneficiary until he has served; and should he die without serving heir, his right does not transmit to his own heir-at-law or of provision, it lapses altogether, and the succession devolves upon the next heir of the beneficiary appointed in the settlement. This doctrine has been finally settled by the decision in the House of Lords in *Buchanan v. Angus* (a). As to the general proposition, that heritable succession does not vest without service, there could be no doubt; but it was thought by some that succession under a trust deed formed an exception to the general rule; but upon what ground, we are not aware. The doubt, however, is now removed.

Equitable interests in heritage do not descend to the Beneficiary's heir by operation of law, but do not vest without service.

The case of *Buchanan v. Angus* decides the point that service is necessary to vest an equitable interest in a *substitute* under a trust deed. The destination was "to my brother, Major Smith, residing in Edinburgh, and the said Mrs Margaret Smith or Heugh, my sister, equally betwixt them, share and share alike, and their *heirs and assignees* whomsoever." The settlor was survived by his brother and sister, and one-half of the succession consequently vested in each. On the death of Major Smith, his sister was entitled to have served heir to him as heir-at-law, and also as heir-substitute under the substitution to heirs and assignees. She did not serve heir, however, but died without having obtained a conveyance from the trustees, leaving a trust disposition and settlement of all her heritable and moveable estate. The House of Lords held that her brother's share of the succession never vested in her, and that his succession,

Do equitable interests vest in a substitute without service?

operation of the Act 4 Geo. IV. cap. 98, which vests the succession in personal representatives without confirmation. According to the older law, confirmation was necessary to vest the right of succession in moveable property, as service still is, to vest the succession to heritable property.

(a) *Buchanan v. Angus*, 15 May 1862, revg. 22 D. 979. The doctrine was assumed by the Court of Session in their judgment; the reversal was on a different point. See also Lord Curriehill's opinion in *Nicol v. Cooper's Trs.*, 14 Feb. 1862, 34 Jur. 259.

after her death, devolved upon the next heir-at-law; thereby affirming the principle that service is necessary to vest a right to heritable succession in an heir-substitute of provision.

SECTION IV.

DILIGENCE AGAINST THE TRUST ESTATE.

Diligence may be used for attaching (1) the legal, or (2) the equitable estate.

Creditors of the Trustee or Trustee may attach the legal estate by diligence.

A trust estate is liable to be attached by diligence at the instance of the creditors of the truster, the creditors of the trustee, and the beneficiaries themselves, or creditors claiming through them. The nature of the diligence which may competently be used in any of these cases, necessarily involves the question of the nature of the right which is sought to be attached, or rather, of the nature of the debtor's title to it. The trustee's title to the legal estate is commensurate with that of the truster; therefore creditors of the truster and creditors of the trustee attach the legal estate directly as it stands in the person of the latter, using the diligence adapted to secure the property of which the trust estate consists. For example, they would use arrestment in the hands of the trustee for the purpose of attaching moveable rights only (a). Corporeal moveables would be secured by poinding, and heritable estate in the person of the trustee by adjudication (b). The nature of the beneficial interest in the estate is, in this case, immaterial.

Creditors of the Beneficiary can only attach the equitable estate.

But the creditors of a beneficiary have no right to attach the trust estate itself, except in so far as it is specifically destined to their debtor. Their doing so would be a palpable infringement of the rights of other beneficiaries, for the estate may not be sufficient to satisfy the claim of any particular beneficiary in full; and if adjudications were led against the estate by the creditors of one or more of the beneficiaries, the trustee would be prevented from realizing the estate for the benefit of other parties having equitable interests in

(a) *Kyle's Trs. v. White*, 14 Nov. 1827, 6 S. 40; but arrestment in the hands of debtors is incompetent, unless the executor has been confirmed; *Henderson's Trs. v. Drummond's Trs.*, 20 May 1831, 9 S. 618.

(b) *E. of Breadalbane v. Macdonald*, 16 Jan. 1824, 2 S. 621; *Kerr v. Graham's Trs.*, 21 Dec. 1827, 6 S. 270. As to inhibition, see *Hutchinson v. M'Laren, etc.*, 11 Mar. 1830, 8 S. 709.

the same part of the estate. Inhibition, which would paralyse the execution of the trust, is, if possible, even a more unwarrantable use of diligence on the part of creditors of a beneficiary; and the Court have invariably recalled inhibition at the instance of such parties, for the obvious reason, that the act of a beneficiary in contracting debt, ought not to have the effect of preventing the trustee from exercising the powers of sale reposed in him by the truster for the benefit of all who are interested in his bounty.

The proper diligence to attach a moveable interest in a trust estate, whether that estate consists of heritable or moveable property, is arrestment (*a*). It is usual to serve a schedule of arrestment on all the trustees; and this form, whether necessary or not, should be observed, as the most sure means of interpellating the trustees from paying to the beneficiary (*b*). Arrestment may be made of the equitable interest in the hands of the trustee, for the purpose of founding jurisdiction; and arrestment by a beneficiary in the hands of a debtor to the trustee, has been held to be a competent mode of founding jurisdiction in an action of denuding (*c*). After the death of a beneficiary, his interest may be attached by confirmation as executor-creditor (*d*).

Moveable interests are attachable by arrestment.

A beneficiary, although in one sense a creditor of the trustee, does not stand in precisely the same position, with respect to the use of diligence, as a creditor upon a contract debt. The creditor in the latter case is not bound by the conditions of the trust. His claim lies against the trust estate as assets of the truster, or against the estate as a fund which was impliedly pledged in security of obligations undertaken by the trustee. For this reason, he can only operate by diligence against the estate in its natural character. A beneficiary, on the other hand, can claim no higher right in the trust estate than the truster has given him. If his right, for ex-

By what diligence a Beneficiary may operate upon the legal estate.

(*a*) *Wilson v. Smart*, 31 May 1809, F. C.; *Kennedy v. Crawford*, 20 July 1841, 3 D. 1266. See *Cunninghame v. Cunninghame*, 28 Feb. 1837, 15 S. 687; *Douglas v. Mason*, 1796, M. 16213.

(*b*) See *Black v. Scott*, 22 Jan. 1830, 8 S. 367.

(*c*) *Rigby v. Fletcher*, 18 Jan. 1833, 11 S. 256; and see cases in Chap. XXIX. (II. 106). It seems doubtful whether a contingent interest in personal estate

is arrestable; as it may be regarded as being *tractum futuri temporis*. See *Pender v. Davidson*, 27 May 1824, 3 S. 69. In *Wilson v. Gloag*, 27 June 1849, 2 D. 1233, an arrestment of the trustee's private property, on the dependence of an action against him in his character as trustee, was recalled.

(*d*) *Maxwell v. Wylie*, 25 May 1837, 15 S. 1005.

Difficulty in the case of heritable property directed to be sold.

ample, is to obtain a share of the proceeds of heritable property directed to be sold, it would seem to be against principle that he should be permitted to attach the estate itself by adjudication; and accordingly, in several cases where this has been attempted, the diligence has been held to be irregular. On the other hand, it is not very easy to see to what other form of diligence the beneficiary can have recourse. He cannot arrest; for the property out of which his share is payable, is in the hands of the trustee himself (a). It has been held that the beneficiary may have a remedy by interdict, if there are reasonable grounds for apprehending that the estate is in danger of being lost to the beneficiary in consequence of the execution of a power of sale (b). But if the complaint is, that the trustee refuses to exercise the power so as to realize a fund for division, there seems to be no way of getting at the estate except by an application to have it put under judicial management (c).

Beneficiary may attach moveable funds by arrestment.

As to moveable funds vested in the trustee, there is no doubt that a beneficiary may attach these by using arrestment in the hands of the creditor, if resident in Scotland. In this way a foundation may be laid for jurisdiction against trustees resident in another country, in virtue of which they may be compelled to account to the beneficiaries for their intromissions, in an action of distribution in the Court of Session. In another chapter we have dealt with the subject of diligence directed against the universitas of the trust estate, when the object is to make up a title to a lapsed succession.

Truster's reversionary interest may be adjudged.

It is to be observed that a reversionary or resulting interest always remains in the truster and his heirs, unless the entire estate has been disposed of by the settlor. Where there is such an interest remaining, it may be attached, if heritable, by adjudication against the truster himself or his *hæreditas jacens* (d); if moveable, by arrestment or confirmation as executor-creditor (e) of the truster. Creditors of a deceased beneficiary may attach his interest in a lapsed succession by declaratory adjudication, or by confirmation *ad omissa* to the settlor's estate, as the nature of the case may require.

(a) See *Hay v. Morrison*, 7 July 1838, 16 S. 1273.

(b) See as to the use of preventive diligence for the protection of the beneficiary's rights, Chapter XXVIII. *supra*, II., p. 101.

(c) Inhibition appears to be incompetent (*Lauderdale v. E. of Fife*, 9 Mar. 1830, 8 S. 675).

(d) *Barbour v. M'Minn*, 7 July 1826, 4 S. 806; *Renton v. Girvan* 30 Dec. 1833, 12 S. 266.

(e) See p. 128, *supra*.

CHAPTER XXXI.

OF THE DOCTRINE OF CONSTRUCTIVE CONVERSION.

THE doctrine of constructive conversion is founded on the principle, that if a settlor has manifested an intention to deal with any part of his estate as succession of a particular quality, that is, as heritable or moveable succession, as the case may be, effect ought to be given to the intention, although the property which is the subject of disposition is of a different nature. Accordingly, money directed to be laid out in the purchase of lands descends to the heirs in heritage: heritable property directed to be sold descends to the personal representatives. In order that the intention to convert may receive effect, it must appear that the conversion directed by the settlor was a conversion for the benefit of some favoured persons; for, as will immediately be seen, a constructive conversion for the benefit of the settlor's legal representatives cannot be inferred.

Doctrine of
constructive
conversion.

We shall now consider—First, the effect of conversion upon the succession of the settlor himself; next, its effect upon the descent of the equitable estate to the beneficiary's heirs; thirdly, the effect of the beneficiary electing to take the succession *in forma specifica*; and, lastly, the properties of the converted estate with respect to assignment, diligence, etc.

SECTION I.

CONVERTED ESTATE CONSIDERED AS SUCCESSION OF THE SETTLOR.

The general rule is, that where property is directed to be converted for the benefit of a settlor's "heirs whatsoever," "heirs and

Distinction
between intes-
tacy and gift

to Heirs and Assignees.

assignees" (or under any general expression comprehending heirs, in moveable as well as heritable succession), the character of the succession is determined by the nature of the property as converted; but where the settlor fails to make any disposal of the property directed to be sold, the character of the succession remains unchanged. Accordingly, land directed to be sold for the benefit of the settlor's heirs will accrue to his personal representatives; but land undisposed of will devolve upon the heir-at-law notwithstanding a direction to convert.

I. Effect of Direction to Convert under a Destination to Heirs and Assignees.

Whether conversion for the benefit of Heirs and Assignees is to be presumed.

Pearson v. Ogilvie.

Lord Curriehill's opinion.

The distinction between questions as to the *immediate* succession to a trust estate, arising in consequence of the settlor having failed to distinguish the class of heirs to whom it was intended to go, and questions as to the succession of a beneficiary who has died before receiving payment of his share, was brought under the notice of the Court by Lord Curriehill in *Pearson v. Ogilvie* (a). The truster directed her trustees to dispose of the residue of her estate, which consisted partly of heritable property, in such way as she might afterwards appoint; and failing such appointment, then to her "nearest heirs or representatives," with power to the trustees, if necessary, to sell her estate for carrying the trust into execution. No special appointment having been made, the next of kin claimed the succession, founding on various expressions in the trust deed, which were said to indicate an intention that the power of sale should be carried into execution. As the Court were of opinion that there was no implied direction, but merely a power to sell, it was unnecessary to determine what effect should have been given to a direction to sell for the benefit of heirs and representatives. But Lord Curriehill said, "The assumption that a direction to testamentary trustees to sell the testator's heritage after his death, imports a destination of the price of such heritage to his next of kin, does not appear to me to be warranted either by authority or principle. . . . Care must be taken not to confound such a case with other two cases, belonging to different categories and regulated by different principles. One of these is the case of the succession

(a) *Pearson & Gardner v. Ogilvie*, 25 Nov. 1857, 20 D. 105.

to the heir himself ; for although he be the party who succeeds to the heritable estate which belonged to his ancestor at the time of his death, even although subsequent to his death it be converted into money by the testator's direction ; yet, as what he is entitled to demand is the price, it might be held that, were he to die before receiving payment, his claim for the price would be included in his moveable succession" (a). The other class of cases to which his Lordship referred were the Exchequer cases upon legacy duty, which we shall afterwards have occasion to consider.

Lord Deas dissented from the opinion, and observed, that as the doctrine of constructive conversion depended on the intention of the truster, the question, whether the succession was to go to heirs or executors, depended simply on the circumstance whether the truster had or had not directed the heritable property to be sold ; for if he had, the result upon succession was the same as if he had sold it himself. "I can see no difference," he said, "in this respect, between those cases which related to the immediate succession of the truster and those which related to the succession of one or more of the beneficiaries."

Opinion of
Lord Deas.

Although the question was still open for consideration, there can be no doubt that Lord Deas had correctly estimated the tendency of the previous decisions. Thus, in *Patrick v. Nichol* (b), where a power was given to sell for the benefit of certain parties, including the testator's nearest heirs whatsoever (to whom the succession ultimately opened), the inheritance was held to have devolved upon the heir-at-law ; but it is assumed in Lord Moncreiff's note that a *direction* to sell, express or implied, would have carried the estate to the executors. In the earlier case of *Cathcart v. Cathcart* (c), where the heirs of an institute were called to the succession, and succeeded as *conditional institutes* of the truster, the word "heir" was held to denote the heir in heritage, but only on the ground that while the trust conferred a power of sale, there was no necessity for carrying that power into execution. It will be observed that this was not a case of succession to a vested interest under a trust deed, but of immediate succession to the truster himself, under the clause

Result of the
authorities is,
that a direction
to sell and pay
the proceeds to
Heirs and
Assignees
operates in
favour of next
of kin.

(a) 20 D. 110.

(c) *Cathcart v. Cathcart*, 26 May

(b) *Patrick v. Nichol*, 7 Dec. 1838, 1830, 8 S. 803.

1 D. 207.

of conditional institution. So also, in the case of *Meiklams v. Meiklam's Trs.* (a), where the succession to a fund settled by a marriage-contract devolved by the destination upon the "heirs and successors whomsoever" of the husband, the Court held that the character of the succession as heritable or moveable was dependent on the terms of the settlement, and not upon the nature of the investment that had been actually made.

Analogous construction where the destination is to the Heirs and Assignees of a Beneficiary.

In the earlier case of *Angus v. Angus* (b), where the parties instituted *nominatim* had predeceased the settlor, heritable property directed to be sold was held to belong to the executors of those parties as conditional institutes under a destination to "heirs, executors, and assignees." As it would be absurd indeed to suppose that the meaning of the word "heirs" in a particular settlement should depend upon the condition whether the institute survived or predeceased the testator, we conclude our remarks on this subject by observing, that the same effect must be given to the principle of constructive conversion in questions between the heirs and representatives of a beneficiary, whether claiming in the character of substitutes or of conditional institutes; and that it is impossible to distinguish between the effect of a direction to convert for *their* benefit, and the case of a direction to convert for the benefit of the heirs of the settlor himself, in default of appointment. In the case of *White's Trs. v. White* (c), where the judgment of Lord Neaves was affirmed by the Second Division, this point was noticed. The trustees were directed to set apart L.1000, and to invest the same in heritable or personal security, for behoof of the truster's daughter in liferent, and her "heirs whomsoever" in fee. Their Lordships were clearly of opinion that, as the power of investment gave the trustees an option to invest either on real or personal security, it was impossible to suppose that there could have been any fixed intention to convert. Although the Lord Justice-Clerk, in his opinion, expressly reserved the question, whether a direction to convert money

(a) *Meiklam's Trs. v. Mrs Meiklam's Trs.*, 2 Dec. 1852, 15 D. 159. In *Buchanan v. Young*, 15 May 1862, where there was a destination over to the "heirs" of the legatees, the question did not arise, the House of Lords having decided that there was no im-

plied direction to convert within the settlement.

(b) *Angus v. Angus*, 6 Dec. 1825, 4 S. 279.

(c) *White's Trs. v. White*, 28 June 1860, 22 D. 1335.

into heritage would in this case have altered the character of the succession, yet the observations of the judges, so far as they go, support the view which we have already expressed (a).

II. *Effect of Direction to Convert upon Undisposed of Succession* (b).

The extension of the doctrine of constructive conversion to the case of destinations to "heirs," may be supported on the ground

Conversion is presumed to be directed for the purposes of the settlement.

(a) It would appear that the Court of Chancery, in the interpretation of directions to convert personal property into realty, or the contrary, does not recognise any distinction between cases of immediate succession and descent through a beneficiary. The doctrine is thus stated in *White and Tudor's Leading Cases*, 2d Ed. I. 668: "Where money has been bequeathed to be invested in land, for the use of the ancestor and his heirs; or where, on the marriage of the ancestor, money has been deposited, either by him or by a stranger, in the hands of trustees, to be laid out in land, to be settled upon himself for his life, remainder to his wife for her life, with remainder to their issue, and in default of issue to the ancestor and his heirs; or if, on the marriage of the ancestor, there be a covenant on the part of a stranger to lay out money in the purchase of land, to be settled to the same uses, and the ancestor die without issue,—in all these cases the heir of the ancestor, and not his personal representatives, will be entitled to the money laid out in the purchase of land."—*Scudamore v. Scudamore*, Prec. Ch. 543; *Disher v. Disher*, 1 P. Wms. 487; *Chaplin v. Horner*, 1 P. Wms. 487; *Edwards v. Countess of Warwick*, 2 P. Wms. 171; *Knights v. Atkins*, 3 Vern. 20.

(b) "Since the case of *Ackroyd v. Smithson*, 1 Br. C. C. 503," say the learned editors of *White and Tudor's Leading Cases*, "so celebrated for the elaborate argument of Lord Eldon, then Mr Scott, it has never been

doubted that, where a testator directs real estate to be sold, and the produce of the sale to be applied for a purpose which either wholly or partially fails, the undisposed of beneficial interest will result to his heir-at-law, and will not go to his next of kin, although the land may have been actually converted into money" (1 Wh. & T. 704). And if a fund, previously impressed with the character of realty by the force of a direction to invest it in the purchase of real property, passes under the beneficiary's general disposition or devise, it will be regarded as realty; and therefore, although, *prima facie*, a general direction to convert the beneficiary's whole estate into money would suffice to *reconvert* the fund impressed with the character of realty, yet a *lapsed* interest in this portion of the beneficiary's succession will fall to the heir-at-law, agreeably to the principle of *Ackroyd's* case (*Re Taylor's Settlement*, 9 Hare, 596, 604; and see *Salt v. Chattaway*, 3 Beav. 576).

It is immaterial whether the lapse arises in consequence of the predecease of the beneficiary, which was the case in *Ackroyd v. Smithson*; in consequence of the settlor having failed to dispose of a portion of the estate which he had desired his trustees to sell; or from any other cause. In *Watson v. Hayes*, 5 My. & Cr. 125, the lapse arose from the settlor having omitted to dispose of a portion of the estate which he appointed to be sold. In *Jessop v. Watson*, 1 My. & K. 665, the produce of the settlor's estate was directed to be divided among his children on their

that, in directing the conversion of his estate, the testator must have foreseen the effect which such conversion, when actually carried into effect, would have upon the character of his succession; and that, in the absence of any direction to preserve the original character of the estate *quoad* succession, he must have intended the

attainment of majority or marriage, and the testator's only child died unmarried and in minority. In both cases the purpose of conversion was held to have failed, and the real estate was found to belong to the heir-at-law. See also *Robinson v. Taylor*, 2 Bro. C. C. 589; *Taylor v. Taylor*, 22 L. J. Ch. 742, and cases there cited.

In *Fitch v. Weber*, 6 Hare, 145, a testatrix, after directing a sale of her real estate, declared that her trustees should stand possessed of the proceeds of the sale, as a fund of personal and not of real estate; for which purpose she declared that such proceeds, or any part thereof, should not in any event lapse or result *for the benefit of her heir-at-law*. She died without having disposed of the residue; and the Court of Chancery, disregarding the disinheriting words, gave the surplus proceeds to the heir-at-law. Vice-Chancellor Wigram observed, that according to the settled course of decisions the heir could only be held to be excluded *for the purposes of the will*; and that, as the testatrix had failed to say who should take the surplus, the law must dispose of it.

The principle, that conversion only changes the succession for the purposes of the settlement, applies also to the converse case of money directed to be laid out in the purchase of real estate; in which case, any undisposed of interest results for the benefit of the settlor's next of kin. The leading case is *Cogan v. Stevens*, 1 Beav. 482, 5 L. J. Ch. 17, decided by Lord Cottenham when Master of the Rolls. In this case the testator had directed that L.30,000 should be laid out on the purchase of

an estate for the ultimate benefit of certain persons in succession, who all died before the period of vesting, with remainder to a charity. The gift to the charity was held to be void under the statute of Mortmain, and the question then arose, as Lord Cottenham states it, "Whether, when a testator directs money to be invested in land for certain purposes, some of which are lawful and take effect, but others fail and become void, the property so given, after satisfying the lawful purposes, belongs to the next of kin, or to the heir of the testator. . . . Upon principle, and upon analogy to several well-established rules in equity, it would appear that there is no doubt as to the proper solution of this question." And accordingly his Lordship, overruling some dicta of a contrary tendency, gave decree in favour of the next of kin.

The question, in what quality a resulting or lapsed interest descends to the legal successors of the settlor's heir or next of kin—as the case may be—has been much discussed in England. We cannot say that the reasoning, upon which the quality of the succession is held to be changed in the person of heirs of the second order, though not changed in the person of immediate heirs, is satisfactory to ourselves. The point has never been raised in Scotland, and we do not think it incumbent upon us to cite foreign authority in support of what is at best not a very substantial distinction. The reader is referred, however, to White & Tudor, I. 708, for an account of the English doctrine. See also Lord Currie's dictum, *supra*, p. 133.

converted estate to go to that class of heirs who would be entitled to it by operation of law.

In all such cases, the conversion is presumed to have been directed for the benefit of a particular class of heirs. But if a settlor, while directing his trustees to convert his estate into property of a different description, leave a share of the succession undisposed of, there is no evidence of intention, so far as that share is concerned, to benefit any person; and the fair inference is, that in directing conversion the settlor had no other object in view than that of facilitating the realization and administration of his estate. The same reasoning is applicable to the case of a direction to convert for the benefit of parties who fail by predecease or otherwise; for when the purpose fails, the intention deducible from that purpose fails also. Upon these general considerations, Lord Loughborough, in *Collins v. Wakeman* (a), and afterwards Lord Cottenham, in the important case of *Cogan v. Stevens* (b), decided that in the absence of a direction as to the disposal of the proceeds of real estate, or in the event of the failure of a destination of personal estate directed to be invested in land, the succession remained unconverted. It is now settled by the leading case of *Taylor v. Taylor* (c), that land directed to be sold with a view to the execution of certain purposes, results to the heir-at-law, whatever be the cause of the failure of the trust purposes.

If the purpose fail, land directed to be sold results to the Heir-at-law; money directed to be invested in land results to the next of kin.

We have no doubt that the right to lapsed interests in Scotch succession would now be held to be governed by the same principle. There is, however, an express decision to the contrary in the well-known case of *Dick v. Gillies* (d). That case has been already overruled on another point by the case of *Lord v. Colvin* (e); and on this point also its authority must be regarded as greatly shaken

Dick v. Gillies criticised.

(a) *Collins v. Wakeman*, 2 Ves. Jun., 683.

(b) *Cogan v. Stevens*, 1 Beav. 482, 5 L. J. Ch. 17; see previous note.

(c) *Taylor v. Taylor*, 22 L. J. Ch. 742 (overruling *Phillips v. Phillips*, 1 My. & K. 649). "The result of the authorities," said Lord Cranworth, "is, that where there is a direction to sell real estates, and that the proceeds shall form part of the personal estate,

the true construction is that the conversion takes effect so far as is necessary to carry out the objects and intentions of the testator; but where the object fails, the direction does not take effect" (22 L. J. Ch. 744).

(d) *Dick v. Gillies*, decided by the whole Court, 4 July 1828, 6 S. 1065.

(e) *Lord v. Colvin*, 7 Dec. 1860, 23 D. 111.

Lord Colonsay's opinion.

by the observations of the Lord President in *Neilson v. Stewart* (a), who expressed a clear opinion that a mere direction to convert an heritable estate into moveable, without giving it to anybody, was a mode of proceeding which could not affect the interests of the heir-at-law. The observation can scarcely be said to have been *obiter* of the case in hand, since the main argument for the executors was, that a *direction* to sell contained in the deed (called a "power" by some of the judges), ought to be carried into execution for their benefit.

Lord Corehouse's opinion.

A similar opinion was expressed by Lord Corehouse in the case of *Finnie v. The Comms. of the Treasury* (b). In that case the Crown was found to be entitled to the resulting interest, so that the distinction between heritable and moveable did not arise; but Lord Corehouse, who had not taken part in the decision of *Dick v. Gillies*, was clearly of opinion that a direction to sell had not the effect of converting lapsed succession from heritable to moveable (c).

SECTION II.

CONVERTED ESTATE CONSIDERED AS SUCCESSION OF THE BENEFICIARY.

Conversion of the Beneficial Interest from Moveable into Heritable.

Moveable estate directed to be invested in land descends as heritage.

To begin with the case of conversion from moveable into heritable, there can be no doubt that in the case of a direction to invest money in landed estate, to be settled upon the testator's heirs of provision, the character of heritable succession is impressed upon the estate, so that not only the principal fund, but also the interest or annual proceeds accruing from it, descend to the heirs of the destination (d). We refer of course to interest and pro-

(a) *Neilson v. Stewart*, 8 Feb. 1860, 22 D. 646. See his Lordship's opinion, p. 656.

(b) *Finnie v. Comms. of Treasury*, 30 Nov. 1836, 15 S. 165. See also *Murray v. E. of Rothes*, 30 June 1836, 14 S. 1049; *Grindlay v.*

Grindlay's Trs., 16 D. 35, per Lord Ivory.

(c) See this point more fully examined in connection with Resulting Trusts in Chapter X. Section I. (I. 188).

(d) *Stair v. Stair's Trs.*, 29 Mar.

ceeds in the hands of trustees, which follow the estate as accessories, and are either accumulated with the principal, or are payable, in default of a direction to accumulate, to the heir of the destination for the time being (a); for as to interest already paid, that must go as personal estate to the executors of the heir to whom it has been paid or is due (b).

On this principle, where a testator directed his executors to purchase the estate of Cairney in Forfarshire, or another estate of equal value, and to settle it upon certain heirs-male specified in the will, and the free fund, after payment of debts and legacies, amounted to only L.750, which was obviously insufficient for the purpose; and the institute, after attaining majority and drawing several years' interest on the above sum, died, leaving a daughter, who claimed the succession as his executor; the Court repelled the claim (c), and gave the fund to the heirs who would have been entitled to succeed to the entailed estate under the destination, on the ground that the money, so long as it remained in the custody of the trustees, was a *surrogatum* for the landed estate which the testator had intended to give (d).

In trusts for the purchase of land, the purchase money follows the destination.

It is by no means certain, however, that even the most express direction to invest trust money upon heritable *security* would impress the character of an heritable succession upon the beneficial interest. There is a clear ground for distinction between directions to invest in land, and in heritable security. Heritable security is the recognised legal investment for trust money. Such an invest-

Direction to invest on heritable security does not change the quality of the succession.

1825, 1 W. & S. 72, affg. 2 S. 205. See 2d action, 2 W. & S. 414, reversg. 4 S. 483; and 2 W. & S. 614, reversg. 5 S. 476; *Howat's Trs. v. Howat*, 17 Feb. 1838, 16 S. 622; *Campbell's Trs. v. Campbell*, 30 June 1838, 16 S. 1253; *Macpherson v. Macpherson*, 11 June 1852, 1 Macq. 243; *Sitwell v. Barnard*, 6 Ves. 520, referred to by Lord St Leonards in *Macpherson's case*; *Dickson's Tutors v. Scott*, 2 Nov. 1853, 16 D. 1; *Moncrieff v. Menzies*, 25 Nov. 1857, 20 D. 94.

(a) See Chap. XVIII. Section 2.

(b) In the *Advocate-Gen. v. Stair's Trs.* (15 July 1850, Exch. Rep.), it

was decided that legacy duty was exigible under 36 Geo. III. cap. 32, in respect of the enjoyment by an heir of entail of the interest and proceeds of trust money directed to be invested in land, as on an annuity for life of the annual amount of such interest and proceeds.

(c) *Fergusson v. Fergusson*, 15 Feb. 1834, 12 S. 456.

(d) The case of *Dick v. Gillies*, 4 July 1828, 6 S. 1065, although erroneous in so far as it extended the doctrine of conversion to intestate succession, is a good authority for the doctrine in its general application.

ment, if made by the trustee in the discharge of his duty as protector of the fund, would not of course affect the succession ; and it does not seem consonant to reason to give any dispositive force or effect to a mere direction to a trustee to make an investment which he would have been bound to make in the ordinary course of administration. It has been settled that a direction to invest in heritable security, "for securing" payment of an annuity, leaves the fund in the condition of personalty (a). In a more recent case (b), the Second Division held unanimously, that a direction to invest money in heritable or personal security left the succession unaltered, although the trustees had *de facto* lent the money on a bond and disposition in security, on the ground that an alternative direction had only the force of a power. The Lord Justice-Clerk (c) observed that he was not prepared to admit that even an express direction to invest on heritable security would have fixed the term "heir whomsoever" to mean heir in heritage.

Conversion of the Beneficial Interest from Heritable into Moveable.

Land directed
to be sold
descends as
personalty.

No proposition in the law of conversion is better established, than that a direction to sell operates a conversion of the beneficial interest from heritable to moveable. The rule in question does not depend upon any technical consideration, but is in the proper sense a rule of construction. If a trustor expresses a wish or intention that his property should be converted into money, and the proceeds either divided into shares or applied in the payment of legacies, the effect of a literal compliance with his direction would be to put an end to the trust, and to vest in each of the legatees a certain sum of money, which, in the event of his death, must descend by the ordinary rules of succession to his personal representatives. In the case we put, the property is *actually* converted, and construction is excluded. It is, however, obviously immaterial whether the conversion, in virtue of the testator's direction, is actually carried out in the lifetime of the beneficiary, or after his death. His succession cannot depend upon the pleasure of the

(a) *Carfrae v. Carfrae*, 3 Feb. 1842, 4 D. 605. Lord J.-C. Hope must be an actual destination of the fee of the particular sum.

observed, that in order that such a direction should have the effect of rendering the fund heritable, there (b) *White v. White*, 28 June 1860, 22 D. 1335.

(c) Lord Glencorse, 22 D. 1338.

trustee; still less upon the accident of the conversion being made at any particular time.

From such considerations as these we deduce the maxim, that a direction to convert is effectual, without regard to the actual period of execution, as soon as the direction is binding upon the trustee (a). Further, as the change in the quality of the succession flows from the intention of the settlor, it is clear that that intention must be equally effectual in whatever form it may happen to be expressed; for, if the purposes of a settlement impose upon the trustee the duty of realizing the estate and dividing the proceeds, the character of the succession in the person of the legatees is changed as a matter of fact by a payment in money, and is constructively held to be changed if a money payment is due. A purpose of conversion is implied wherever there is an express direction to sell, although, but for such direction, the property might conveniently and with advantage have been conveyed specifically.

Implied direction has the same effect as express.

In order that a trust may have the effect of an *implied* direction to sell, it is not enough that it should appear that the testator contemplated that the power of sale should be carried into execution. It must appear, as Lord Ch. Westbury observed, adopting the language of Lord Fullerton, that the exercise of the power is *indispensable* to the execution of the trust; or, as in another passage, that the trust is imperative, and not optional (b). As for conditional trusts, it may be doubted, notwithstanding Lord Westbury's dictum, whether the quality of the succession can be held to be affected by the emerging circumstances which determine the condition.

A power only receives effect as an implied direction where the exercise of the power is indispensable to the execution of the trust.

It is right to mention, that some doubts have recently been cast upon the authority of the revenue cases, as bearing upon questions of succession (c). But on the simple question, whether certain

To what extent the Legacy Duty cases are authoritative.

(a) *Durie v. Coutts*, 1791, M. 4624; *Wilson v. Smart*, 31 May 1809, F.C.; *Grierson v. Ramsay*, 1780, M. 759, Hailes, 855; *Ramsay v. White*, 26 June 1833, 11 S. 786; *Angus v. Angus*, 6 Dec. 1825, 4 S. 279; and other cases noted *infra*.

(b) *Adv.-Gen. v. Blackburn's Trs.*, 3 April 1847, per Lord Fullerton, p. 32, 33 of Exch. Rep.; *Buchanan v. Young*, 15 May 1862, per Lord Ch. Westbury.

(c) Thus in *White v. White*, the Lord J.-C. (Lord Glencorse) said, "The reference to the cases under the Revenue Statutes seems to me perfectly worthless. The expressions in the judgment of Lord Neaves (who delivered the judgment of the Court in *The Adv.-Gen. v. Hamilton*), when taken in connection with the case he was considering, are quite easily explained. Questions under the Revenue

provisions in a deed of settlement denote an intention to change the quality of the succession, the authority of the Exchequer cases would seem to be directly in point. The statutes impose a tax upon the residue "of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed by any will or testamentary instrument" (a). The question arising upon the construction of these Acts is, whether the will or testamentary instrument contains expressly or by implication a *direction to sell*, which, as we have seen, is precisely the point upon which the quality of the succession, as heritable or moveable, hinges. This estimate of the bearing of the cases derives support from a remark of Lord Brougham in a leading Exchequer case, where, after observing (b) that if the instruments, taken as a whole, amounted to a direction to sell the heritable estate, it was to be dealt with as money at the testator's death in all respects, he adds, that by that criterion must be determined "both the rights of private parties, with which we have nothing to do, except by way of argument and illustration, and the rights of the Crown" (c).

Construction
of conditional
powers in
Revenue and
Succession
cases.

However, it must be admitted that the Courts of Exchequer in England and Scotland have applied the doctrine of constructive conversion to cases in which it was impossible to suppose that the quality of the estate as to succession was altered. Keeping in

Statutes are not whether the subjects are heritable or moveable. In these cases all turns on the expression of the trust deed, whether there is a direction, or something equivalent to it, to sell, mortgage, or otherwise dispose of heritable subjects, so as to convert them into money" (28 June 1860, 22 D. 1335, 1339). And the observation of the Lord President (Lord Colonsay), in *Buchanan v. Young*, is to a similar effect:—"I am not, however, disposed to place my opinion entirely on the result of the Exchequer cases; because there is an element introduced into these cases that does not occur here—I mean the precise phraseology and meaning of the Revenue Acts" (13 Mar. 1860, 22 D. 979, 981).

(a) 48 Geo. III. c. 149, Sch. Part 3; and see 55 Geo. III. c. 184, Sch. Part 3.

(b) *Adv.-Gen. v. Williamson*, 16 Mar. 1843, 2 Bell, 89, affirming 23 Jan. 1840, Exch. Rep.

(c) In the *Adv.-Gen. v. Blackburn's Trs.* (3 April 1847, Exch. Rep. p. 35), Lord Fullerton, in reference to the succession cases, said that the same rule of construction by which a power was in that Court held equivalent to a direction, had been applied in our practice in cases of a different kind, but involving the same general principle. And the applicability of the Exchequer cases to the illustration of questions on succession was very forcibly pointed out by Lord Deas in *Gardner v. Ogilvie* (25 Nov. 1857, 20 D. 105).

view the criterion of Lord Fullerton and the House of Lords, we assume that a discretionary power, as distinguished from a direction, has no convertive operation. Such powers are frequently given to provide for the payment of debts out of the estate in case of necessity, and are quite compatible with an intention to retain the estate (a). It is clear, therefore, that the cases of *Simcox* and *Hamilton*, in which it was held that if the trustees had an arbitrary discretion to sell, the incidence of legacy duty was determined by the event, are of no authority in questions as to succession (b). Where the direction is *not* to sell unless with the consent of the beneficiaries, there is no conversion unless such consent be given (c).

Gray's Trustees v. Gray.

A power given to trustees to sell heritage and "pay over" the residue, is not conclusive evidence of an intention to convert; and therefore, even in a question as to legacy duty, heritable property which was the subject of such a destination was held to remain unconverted where the trust was for payment of the whole residue of the estate, heritable and moveable, *to one residuary legatee*, and the power was not granted with any special reference to the ultimate purposes of the trust (d). *A fortiori*, a trust of heritable and moveable estate, with a power of sale, for payment of debts and legacies, and an ultimate direction "to dispoise, assign, and pay over" to one residuary legatee and his heirs, does not alter the legal order of succession; for the words of disposition fall to be construed *applicando singulæ singulis*: the heritable property is to be disposed, and the moveable to be paid over (e). The case of *Speirs* (f), where trustees, clothed with a power of sale, were directed, after payment

Construction of words "pay over," etc.

(a) *Cathcart v. Cathcart*, 25 May 1830, 8 S. 803; *Sinclair v. Traill*, 27 Feb. 1840, 2 D. 694; *Strachan v. Mowbray*, 21 Feb. 1843, 5 D. 687; *Grindlay v. Grindlay's Trs.*, 8 Nov. 1853, 16 D. 27; *Adv.-Gen. v. Smith*, 1 Mar. 1852, 14 D. 585, Exch. Rep.; *Burrell v. Burrell*, 14 Dec. 1825, 14 S. 314.

(b) *Attorney-Gen. v. Simcox*, 1 W. H. & G. 749; *Adv.-Gen. v. Hamilton*, 22 Feb. 1856, 18 D. 636; *Attorney-Gen. v. Mangles*, 5 M. & Wel. 120. See 22 D. 1340, per Lord Justice-Clerk Inglis; *Durie v. Coutts*, 1791, M. 4624.

(c) *Gray's Trs. v. Gray*, 23 June 1862 (Lord Ardmillan).

(d) *Adv.-Gen. v. Smith*, 1 Mar. 1852, Exch. Rep; see Lord Rutherford's opinion, pp. 36, 37; affirmed 15 June 1854, 1 Macq. 760.

(e) *Cathcart v. Cathcart*, 26 May 1830, 8 S. 803; and see *Buchanan v. Young*, 15 May 1862, H. of L.; *Ramsay v. White*, 26 June 1833, 11 S. 786.

(f) *Speirs v. Speirs*, 21 Nov. 1850, 13 D. 81.

of annuities and provisions to the granter's children, "to make payment of, or dispose, convey, and make over," the residue to the truster's eldest son, and his heirs or assignees, was, on similar principles, decided in favour of the heir in heritage, on the ground, as stated by Lord President Boyle, that there was "a total want of any provision for dividing the proceeds of the lands and personal estate embraced in the trust, and that no individual except the eldest son was created a beneficiary under it."

"Free proceeds."

In *Grindlay v. Grindlay's Trs.* (a), a power of sale was given to trustees for payment of debts and legacies; and the ultimate direction was to hold and possess the residue, to give the liferent of it to the truster's widow, and in the event of no children being left (which happened), to sell the whole property and effects, heritable and moveable, and to apply the "free proceeds" of the whole to religious purposes. By a codicil the truster declared—"I hereby revoke the destination of residue under purpose lastly, and now leave the entire free proceeds to my said wife." Lord Anderson was of opinion that the terms of the codicil did not operate a revocation of the direction to sell. But on a reclaiming note, the First Division held that the direction in question was auxiliary to the purpose of distribution amongst religious institutions; and that, as the purpose of the codicil was a bequest to one beneficiary, and as the contemplated sale was no longer necessary for the accomplishment of that purpose, and might even be prejudicial to the party whom the testator intended to benefit, the direction was no longer binding. They accordingly found that the land and other heritable subjects conveyed by the trust deed in question, were to be deemed and held as heritable subjects in all questions relating to the widow's succession (b).

Power to sell
"if necessary."

The addition of the words "if necessary" to a power of sale rather militates against the supposition of an intention to convert; for the necessity is held to refer to payment of debts, and the like (c). In *Buchanan v. Young* (d), where the power was qualified by the words "if necessary," and the ultimate direction was to "pay over,"

(a) *Grindlay v. Grindlay's Trs.*, 8 Nov. 1853, 16 D. 27.

(b) 16 D. 37.

(c) *Gardner v. Ogilvie*, 25 Nov. 1857, 20 D. 105; *Strachan v. Mowbray*, 21 Feb. 1843, 5 D. 688. In this case the

context showed an intention of keeping up the estate in the family.

(d) *Buchanan v. Young*, 13 Mar. 1860, 22 D. 979; revd. 15 May 1862.

the First Division of the Court of Session considered that the intention of the testator was that the produce of his estate should be divided between the beneficiaries, and held the estate to be moveable; but the judgment was reversed by the House of Lords, on the ground that the terms of the deed of settlement were not incompatible with the supposition of a purpose of specific conveyance.

The import of the cases upon implied directions may be stated to be, that where a power of sale is conferred with a view to the realization of the *universitas* of the succession, and the distribution of the proceeds amongst the individuals named in the deed, at such times or under such circumstances that the trust cannot be executed without selling, such a power is to be construed as a direction, and carries the *jus crediti* to the personal representatives of the beneficiaries, or their executors nominated by testament (a).

Result of the authorities upon implied directions.

SECTION III.

RECONVERSION OR ELECTION BY THE BENEFICIARY.

In point of principle, it is clear that, as the omission on the part of the trustee to convert the trust property leaves the force of the truster's direction unimpaired, so, on the other hand, the actual conversion of the estate by the trustee, whether in pursuance of a power, or on the ground of supervening necessity (*e.g.*, where the free funds are insufficient for the payment of debts), will not alter the quality of the succession (b). It has been decided in several of the Exchequer cases, that the incidence of legacy duty does not depend upon the actual situation of the estate at the expiration of the trust (c); and, *a fortiori*, it may be assumed that the

The acts of the Trustee cannot alter the quality of the trust estate.

(a) See *Ramsay v. White*, 26 June 1833, 11 S. 786; *Adv.-Gen. v. Williamson*, 16 Mar. 1843, 2 Bell, 89, and 23 Jan. 1840, Exch. Rep.; *Adv.-Gen. v. Blackburn's Trs.*, 3 April 1847, Exch. Rep.; *Re Ramsay's Tr.*, 2 Cr. M. & R. 224, note; and other cases cited in this chapter.

(b) See *Wauchope v. Wauchope*, 14 June 1737, 1 Cr. St. & P. 200;

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Davidson v. Kyde, 1797, M. 5597; *Berford v. Brown*, 1 June 1832, 10 S. 609; *Gray v. Walker*, 11 Mar. 1859, 21 D. 709. See the provisions of the Lands Clauses Consolidation Act as to compulsory sales, 8 Vict. cap. 19, § 67-8; *Pet. Blair's Trs.*, 14 Feb. 1852, 14 D. 496.

(c) *Adv.-Gen. v. Williamson*, 23 Jan. 1840, Exch. Rep.; 16 Mar. 1843, 2

rights of the beneficiary's heirs *inter se*, so long as the estate remains in the hands of the trustees, must depend solely upon the nature of the estate as fixed by the deed of trust (a). An heir in heritage, burdened with payment of money provisions to younger children, is a trustee for their interests; and therefore, although he assign heritable bonds in lieu of a money payment, the interest of the younger children will nevertheless remain moveable, and as such will descend to their executors (b).

Where Trustees are directed to purchase heritable estate for a Minor, can he elect to take the succession in cash?

The succession of minors, as regards heritable property at least, does not depend upon the will of the minor; and, accordingly, it is thought that, in the case of a direction to purchase an estate for a minor, the election of the latter to take the succession in cash would not alter the quality of his succession, which would still fall to be regulated by the provisions of his ancestor's settlement. In *Scott v. Scott* (c), a husband bound himself by marriage-contract to lay out and secure L.5000 to his wife in liferent, and the children of the marriage in fee. He died without laying out the money, and his heir, in implement of the obligation, assigned two heritable bonds for the amount to the widow and children, on which they were infeft for their respective interests. It was held that the share of a child who died in minority was moveable as to succession, on the ground, as stated by the Lord President and Lord Mackenzie, that an option given to invest in heritable or moveable security could not affect the succession, and that the rights of heirs were not to be altered or modified by the operations of parties in the position of administrators. However, it has still to be determined in the case of a sale of heritable estate by a trustee under a mere power, if payment in money is made to the beneficiary, being a minor pubes, whether that will not change the character of the succession in his person. It would seem that, as a minor possesses the *testamenti factio*, the fact of his dying intestate, after having had the money paid to him in terms of the will, is presumptive of an intention that he intended to leave the money to his next of kin.

Whether a Minor can elect to take heritable estate in *forma specifica*.

Conversion by the Curator of a lunatic.

Conversion by the curator of a lunatic does not, as a general
 Bell, 89; *Adv.-Gen. v. Anstruther*, 2 *Trs.*, 2 Dec. 1852, 15 D. 159; *Nisbet*
 July 1842, Exch. Rep.; *Adv.-Gen. v. Rennie*, 18 Dec. 1818, Hume, 221.
Blackburn's Trs., 3 April 1847, Exch. (b) *Scott v. Scott*, 25 June 1846, 8
 Rep. D. 892.
 (a) *Meiklam's Trs. v. Mrs Meiklam's* (c) *Scott v. Scott*, *supra*.

rule, alter the succession, as was found in a case where land belonging to a lunatic proprietor was sold under the compulsory powers of an Act of Parliament (a). But the conditions of the question are materially altered when the sale is carried through at the instance of creditors, or even by the curator himself under judicial authority, upon the ground of legal necessity. The Lord President (b), in *Moncrieff v. Milne*, accordingly reserved his opinion as to the disposal of surplus funds arising from a sale in such circumstances (c).

In the case of *Emslie v. Groat* (d), it was decided that an apparent heir selling his ancestor's estate without having made up a title by service (and having therefore no vested interest), did not thereby alter the character of the succession, but that the price enured to the next heir as a surrogatum for the landed estate.

Conversion by
an apparent
Heir not
served.

It appears that if a beneficiary elect to take the trust estate as it is, instead of taking it in the character which has been impressed upon it by the truster's settlement, his election will determine the character of the succession, although he should happen to die before the trustees have denuded. This was one of the grounds on which Lords Ivory and Rutherford, in the case of *Grindlay v. Grindlay's Trs.* (e), were of opinion that certain urban subjects retained their heritable character in a question as to the beneficiary's succe-

Election by
Beneficiary
to take con-
verted estate
in its original
form.

*Grindlay v.
Grindlay.*

(a) *Moncrieff v. Milne*, 16 July 1856, 18 D. 1286.

(b) Lord Colonsay, 18 D. 1295.

(c) It was observed by Lord Eldon (*ex parte Phillips*, 19 Ves. 124), that if it was for the advantage of a lunatic whose real estate was embarrassed by debt, the Court would authorize the sale of the estate rather than allow the personalty to be exhausted; and it appears that in various cases the personal property of lunatics has been applied, under the authority of the Court of Chancery, in ameliorating the condition of the real estate,—e.g., in paying off mortgages (*Ozenden v. Lord Compton*, 2. Ves. Jun. 74), in necessary improvements (*Sergeson v. Sealey*, 2 Atk. 414; *Dormer's case*, 2 P. W. 262), repairs, or fines for renewals of leases or admissions to copyholds (*ex parte Grimstone*, Amb. 708;

Re Badcock, 4 M. & Cr. 440). We may observe that in the latter case the judgment authorizing the investment of the money in improvements was qualified by the remark, that "it would be right that the sum so laid out should retain its character of personalty;" and this dictum is confirmed by the decisions in *Re Leeming*, 7 Jur. N. S. 115, and *Weld v. Tew*, Beatt. 272. See also Lewin, Tr., 4th Ed. 638.

(d) *Emslie v. Groat*, 25 Feb. 1817, Hume, 197.

(e) *Grindlay v. Grindlay's Trs.*, 9 Nov. 1853, 16 D. 27. The principle of election or constructive reconversion was also recognised in the cases of *Nicolson's As. v. Macalister's Tr.*, 2 Mar. 1841, 9 D. 675; and *Williamson v. Paul*, 15 Dec. 1849, 12 D. 372.

sion, notwithstanding that the trustor had *appointed and authorized* his trustees to dispose of them by public or private sale. The beneficiary, who was also trustee, instead of selling the property, had let it on a ten years' lease, and in her trust settlement had referred to it as her heritable estate, conveyed to her by her late husband. Those circumstances, in the opinion of their Lordships, amounted to an election on the part of the lady to take the estate in its character of heritage (a).

(a) The principle of reconversion by the election of the beneficiary has given rise in England to a variety of nice distinctions. We can only find room for a brief abstract:—

1. Election may be made by a person *sui juris*, either in writing or by parole. Lord Eldon and other judges have expressed the opinion that, although the declaration of the *cestui que trust* would not be admissible in a question with third parties, it was binding *inter hæredes* (*Wheldle v. Partridge*, 8 Ves. 236; *Poultney v. Darlington*, 1 B. C. Ca. 237; *Edwards v. Countess of Warwick*, 2 P. W. 174; *Chaloner v. Butcher*, cited in *Crabtree v. Bramble*, 3 Atk. 685).

2. Election to take real property in that character may also be made constructively,—as, for example, by the *cestui que trust* entering into possession of the property, and taking the title-deeds into his custody (*Davies v. Ashford*, 15 Sim. 42, 14 L. J. Ch. 473; *Griesbach v. Fremantle*, 17 Beav. 314). In *Dixon v. Gayfere*, Sir John Romilly, M. R., observed that slight circumstances might be sufficient to raise a presumption of reconversion, and that, in the absence of other facts, the retaining of the lands for a great length of time would be sufficient to induce the Court to come to that conclusion; but in that case the length of possession was insufficient, and the death of the *cestui que trust*, without having sold the property, was adverse to the supposition of reconversion (23

L. J. Ch. 60, see p. 64; and see *Kirkman v. Myles*, 13 Ves. 338). And so, where money is to be turned into land, reconversion may be implied from the receipt of the principal, but not of the annual income (*Gillies v. Longlands*, 20 L. J. Ch. 441). Reconversion may also be effected by changing the securities on which money is invested, as was found in *Harcourt v. Seymour*, 2 Sim. N.S. 12, 20 L. J. Ch. 606, where Lord Cranworth said it was sufficient if the Court saw that the party meant the estate to be dealt with as money, and that it was immaterial whether he knew that, but for his election so expressed, it would have been turned into land.

3. As a general rule, there can be no reconversion by a person subject to legal incapacity (*Carr v. Ellison*, 2 B. C. Ca. 56; *Padbury v. Clark*, 2 M'N. & G. 298; *Ashby v. Palmer*, 1 Mer. 296). But although at common law a married woman could not have elected to reconvert, it was afterwards held, in consequence of the powers given by 3 & 4 Wil. IV. c. 74, §§ 40, 71, and 77, and 8 & 9 Vict. c. 106, § 6, to married women to dispose, with the concurrence of the husband, of any estate or interest at law or equity,—that land devised upon trust in terms amounting to a conversion might be disposed of by a married woman as an interest in land (*Briggs v. Chamberlain*, 11 Hare, 69, 23 L. J. Ch. 635; *Tuer v. Turner*, 20 Beav. 460, 24 L. J. Ch. 668).

4. In *Lingen v. Souray*, 1 P. W.

If a trust estate is sold after the death of one of the beneficiaries by the direction of the surviving beneficiaries, such election to take the land as money, although it will be sufficient to determine the character of the succession of those who consented, cannot operate as a conversion of the share of the beneficiary who died before the property was sold (a). Election by one Beneficiary of a class.

It is almost superfluous to add, that revenue cases can throw no light upon questions of succession depending upon reconversion. The Acts impose a duty upon personal property directed to be sold; and the fact of the beneficiary having accepted a disposition of the unconverted heritage, obviously affords no reason for depriving the Exchequer of the legacy duty due to it, under the terms of the testamentary disposition (b). As little can the sale of heritage by trustees at the beneficiaries' request warrant the imposition of legacy duty, where the intention of the testator was that the estate should be conveyed specifically (c). Revenue cases.

172, it was decided by Lord Harcourt that a remainder-man might elect to reconvert the trust estate, so as that his election should be binding *inter hæredes*. But such election would of course be subject to the right of the owner of the prior estate to call for the actual conversion of the land or money in accordance with the instrument of trust (*Gillies v. Longlands*, 4 De Gex & Sm. 379); which, in Mr Lewin's opinion, would render the intended election ineffectual (*Lewin, Tr.*, 4th Ed. 625). According to Scotch principles, it is conceived that the efficacy of such an intentional reconversion by the party entitled to a reversionary interest, would depend upon whether the interest was vested. If the prior estate were a mere life interest in land, it is thought that the life tenant might elect to take the lands specifically on securing the life tenant's interest by a bond and disposition in security. But if the prior estate in question were a fee of the proceeds of land directed to be sold, with a substitution, it is pretty clear that the substitute could not interfere to prevent

the sale, because the institute in the case supposed would have a clear interest to take the estate in money, and so defeat the substitution.

5. According to English decisions, where an estate is directed to be sold for the benefit of several persons, it is not in the power of any single beneficiary to prevent the sale (*Holloway v. Radcliffe*, 3 Jur. N. S. 198; *Chalmer v. Bradley*, 1 J. & W. 59); but if money be directed to be laid out in lands, any one of the beneficiaries may elect to take his own share as money, for in so doing he does not come into conflict with the interests of his colegatees (*Seeley v. Jago*, 1 P. W. 389; *Walker v. Denne*, 2 Ves. Junr. 182, per Lord Loughborough).

(a) *Strachan v. Mowbray*, 21 Feb. 1843, 5 D. 688.

(b) *Adv.-Gen. v. Williamson*, 16 Mar. 1843, 2 Bell, 89; affirming 23 Jan. 1840, Ex. Rep.; *Re Holford*, 1 Price, 426; and see *Re Ramsay's Trs.*, 2 Cr. M. & R. 224, note.

(c) *Re Evans*, 2 Cr. M. & R. 206; and see *Adv.-Gen. v. Blackburn's Trs.*, 3 April 1847, Exch. Rep.

SECTION IV.

PROPERTIES OF THE CONVERTED ESTATE.

To what extent does converted succession retain the properties of the original estate?

In the previous sections we have considered the character of the converted estate as heritable or moveable in its relation to the question of succession *ab intestato*. Its other properties have been adverted to but slightly, and that only in illustration of the general argument. Enough has been said, however, to show that a succession, although constructively, or even actually converted, may retain certain of the properties of the original estate. Moveable property converted into heritage at the request of the beneficiary, or personal interests in land reconverted in consequence of the beneficiary electing to take over the estate specifically, may so far retain their moveable character as to be liable in payment of legacy duty. Upon that question it is unnecessary to say more; but on the general properties of the converted estate—the mode in which it is capable of being affected by diligence, its transmissibility by testament, assignation, etc., and the legal claims affecting it—we have a few remarks to offer.

Distinction between effect of conversion in regard (1) to legal claims, and (2) to transmission.

In point of principle, it is plain that the legal claims exigible out of an heritable or moveable estate must be determined by its character as vested in the settlor; for if the rule were otherwise, the settlor might defeat the rights of the claimants by a mere expression of intention that his estate should be disposed of in a different character from that which it actually possessed. The mode of transmission, on the other hand, after the estate has passed out of the trustor's control, would seem to depend to some extent upon the character of the interest which the beneficiary has in it.

I. *Legal Provisions payable out of Converted Estate.*

Converted heritage remains subject to claims of heir, and to terce and courtesy.

It is clear that constructive conversion, which is the creature of intention, can have no effect upon the rights of the trustor's legal successors. For example, a direction to sell in a disposition of heritable estate would not bar a reduction *ex capite lecti*. This subject has been already discussed in treating of the interest of the

settlor's heirs and executors in the converted succession (*a*). The same principle must regulate the incidence of terce, *jus relictæ*, and legitim. Terce, for example, is exigible out of all the lands in which the proprietor died infeft (*b*). No direction to convert those lands *after* the settlor's death can therefore be of any avail to exclude the rights of the widow; and accordingly it was found, in a case where a part of the lands of a deceased proprietor was sold for payment of his debts, that the widow was entitled as tercer to a share of lands equal in yearly value to a third of the whole lands in which her husband died infeft, including what had been sold (*c*). The case referred to may be contrasted with another (*d*), where a proprietor having disposed his estate by an *ex facie* absolute conveyance *inter vivos*, in security of borrowed money, it was held that terce was only exigible out of the reversion; that reversion being the measure of the husband's title and interest at the time of his death (*e*).

Jus relictæ, again, being an absolute right to the capital of one-third, or one-half, as the case may be, of the husband's free personal estate, it is clear that any direction to invest such estate in heritable property can only be carried into effect to the extent of affecting the residue after allowing for that claim (*f*). The remark is equally applicable to legitim. A truster, in contemplation of law, disposes only of the dead's-part—his own share of the succession (*g*). Accordingly, it was expressly determined in the case of *Hog v. Hog* (*h*), that legitim could only be disappointed by an actual beneficial con-

Converted personality is subject to legitim and *jus relictæ*.

(a) *Supra*, Section 1.

(b) Ersk. 2, 9, 46; Bell's Prin. § 1598.

(c) *Arbuthnott v. Arbuthnott's Trs.*, 23 June 1805, Hume, 294. And see *Bell v. Halliday*, 8 Dec. 1825, 4 S. 286.

(d) *Bartlet v. Buchanan*, 27 Nov. 1812, F. C. On the same principle, terce is diminished by all heritable securities and real burdens completed by infeftment in husband's lifetime (*Campbell v. Campbell*, 1776, 5 Br. Sup. 627; *Stewart*, 1792, cited 1 Bell's Com. 686, Note 3).

(e) On the subject of the truster's

reversionary interest, see Chapter XXXIII.

(f) See *Ramsay v. Cowan*, 11 July 1833, 11 S. 967.

(g) *White v. Finlay*, 15 Nov. 1861, 24 D. 88; see p. 49, per Lord J.-Cl. Inglis.

(h) *Hog v. Hog*, 14 May 1800, 16 July 1804, F. C.; M. Legitim, No. 8. On the point that an absolute conveyance *inter vivos* takes the property out of the legitim fund, see *Milroy v. Milroy*, 31 May 1803, Hume, 285; *Collie v. Pirie's Trs.*, 22 Jan. 1851, 13 D. 506.

veyance *inter vivos*; and that although a disposition of moveable property was in form a *de presenti* conveyance, yet if it should appear that the assignment was made upon trust to invest the fund in land after the trustor's death, the fund would remain moveable and subject to legitim.

Legitim, etc.,
not exigible
out of pro-
ceeds of lands
directed to be
sold.

Moveable
interests in
land.

Conversely, legitim and *jus relictæ* are not exigible out of the proceeds of land disposed to trustees upon trust to sell and divide the proceeds. This was determined with reference to a trust for sale, in which the sale had been carried through in the settlor's lifetime, although the purchaser had not obtained a conveyance (a). On principle, it is obvious that as the lands would go to the heir in the case of a lapse notwithstanding the direction to sell (b), they cannot be subject to the claims of the personal representatives. But a moveable interest in landed estate, *e.g.*, the right of a partner to a share of lands (c) or heritable bonds (d), forming part of the company estate, is of course subject to the legal claims of the widow and children.

II. *Transmission of Converted Property.*

Although in one sense every beneficial or equitable interest in a trust estate may be described as a "personal" right (e), yet it is to be observed, that an equitable interest in land is heritable, and is incapable of transmission by testament. A conveyance of the equitable interest in a trust of heritable estate must therefore be in the dispositive form (f); and it was laid down in a recent case, that the heir's interest can only be taken up by service (g). Such being the general rule, it remains to be seen how far the requisites of

(a) *Baillie's Trs. v. Cross*, 2 June 1832, 10 S. 617.

(b) *Neilson v. Stewart*, 3 Feb. 1860, 22 D. 646; see 656, per Lord Pr. M'Neill.

(c) *Sime v. Balfour*, 1 Mar. 1804, F.C., M. Her. & Mov., No. 3, affd. 22 July 1811, as *Kirkpatrick v. Sime*, 6 Paton, 525; sequel, as *Minto v. Kirkpatrick*, 23 May 1833, 11 S. 632.

(d) *Corse*, 10 Dec. 1802, F.C.; M. Her. & Mov., No. 2.

(e) Because the beneficiary is not the feudal proprietor, and cannot, for

example, maintain an action of mails and duties, or other real action; *Drummond v. Mackenzie*, 1758, M. 16206.

(f) See *Crawford v. Earl of Dundonald*, 22 May 1888, 16 S. 1017. Lord Cuninghame indicated an opinion that the right to call on a trustee to convey a heritable subject was itself heritable in a question as to the form of transmission (16 S. 1019; *Wilson v. Smart*, 31 May 1809, F.C.).

(g) *Buchanan v. Young*, 15 May 1862, House of Lords.

valid transmission of an equitable interest may be affected by the character impressed upon it in virtue of a direction to convert.

It may be assumed with tolerable certainty, although the point has never been expressly decided, that a beneficial interest in the proceeds of land held by trustees, subject to a direction to convert, is transmissible by assignation or testament, and capable of being attached by arrestment. This has been assumed in several of the succession cases, in which the import of such directions was under consideration. For example, in *Speirs v. Speirs* (a), Lord Cunningham said, "When a trust has been executed for payment of creditors, and thereafter for division of the surplus, when realized, among a multiplicity of legatees, the interest of the latter, whether realized or not, is held as moveable, because the trust is viewed as granted solely for the purpose of liquidation and division, and the beneficiaries have only a *jus crediti* or personal claim against the trustees, which is arrestable." It is true that in *Gardner v. Ogilvie* (b), Lord Curriehill, adverting to the possibility of completing a title by confirmation to the proceeds of heritable property directed to be sold, indicated an opinion that converted estate could not be dealt with as moveable succession in a question as to transmission. However, in the prior case of *Ramsay v. Lady White* (c), it had been decided by a unanimous judgment of the Second Division, that an interest in heritable and moveable property, vested in trustees under trust to sell, was carried by the will of a beneficiary; and though some doubt was expressed as to whether a share in a house forming part of the trust estate passed under the will, the difficulty seems to have had reference to the terms of the destination rather than to the question of subsequent transmission.

Equitable interest in proceeds of land directed to be sold is transmissible by assignation or arrestment.

It can easily be shown by general reasoning that such interests are transmissible by testament; for, if not, they fall, as we have already seen, to the beneficiary's next of kin; and to hold that the next of kin are preferable to the testamentary executors, is too obvious a paradox to call for refutation. As the same principle must regulate the mode of transmission, whether by testament or assigna-

Transmission of equitable interest in converted heritage by testament.

(a) *Speirs v. Speirs*, 21 Nov. 1850, 13 D. 81; see p. 87. See Bell's Com. 858 (5th Ed., I. 37). The point was decided in *Gray's Trs.*, *supra*, p. 143.

(b) *Gardner v. Ogilvie*, 25 Nov. 1857, 20 D. 105, see 110.

(c) *Ramsay v. Lady White*, 26 June 1838, 11 S. 786.

tion *inter vivos*, we may conclude that moveable rights of succession to heritable property are capable of being transmitted in the same manner as partnership rights, which are well known to be assignable without the use of dispositive words, although comprehending interests in heritable property (a).

Transmission of equitable interests in money rendered heritable by destination.

As regards beneficial interests in money rendered heritable *destinatione*, it is doubtful whether they would be carried by a testament. The case of *Ross v. Ross* (b), where the question was decided in the negative, with reference to bonds secluding executors, is not conclusive, because the opinions of the judges proceeded partly on the ground that money bonds were in their own nature heritable, except in so far as affected by the statute 1661, cap. 32, and the exclusion of executors was, in their opinion, an exclusion of the statute. The question, however, is virtually decided by the case of *Crawford v. The Earl of Dundonald* (c). The truster had granted an assignation of the right to a bill debt with a view to the trustee leading an adjudication in her favour, and subject to an obligation to denude in favour of the truster, her sister, or assignee. On the death of the truster's sister, an action was brought by her heirs, under certain testamentary instruments, to have it found and declared that the trust had expired, and that the right to the debt was in them. The Court held that the debt, having been rendered heritable in the person of the truster's sister by the decree of adjudication, could not be transmitted by testament. This decision, we think, must rule the case of money rendered heritable by a direction to invest in the purchase of lands.

(a) See Bell's Com. 719, 5 Ed., II. 3; *Minto v. Kirkpatrick*, 23 May 1833, 11 S. 632; *Irvine v. Irvine*, 15 July 1851, 13 D. 1367.

(b) *Ross v. Ross*, 11 July 1809, F.C.; and see cases in Br. Syn. 2329.

(c) *Crawford v. Earl of Dundonald*, 22 May 1838, 16 S. 1017.

CHAPTER XXXII.

OF THE COMPLETION OF A TITLE TO THE EQUITABLE ESTATE.

WE are now to treat of the mode of enforcing the beneficiary's right to specific conveyance, where the estate is secured to him either by the constitution of the trust or by subsequent investment. We may observe in passing, that although a beneficiary has his right secured upon the trust estate, he is not necessarily entitled to demand a specific conveyance. For example, the trustor's property may be effectually secured during the continuance of the trust by investment on heritable or personal security in name of the trustees, and subject to the purposes of the trust; and yet if those purposes are for division into money shares, the claim of the beneficiary will resolve into a right of action against the trustee for payment of his proportion of the proceeds of the investments. In such a case, however, it is thought that upon the death of the trustee, the beneficiaries would be in a position to make up a title to the estate, and carry out the purposes for their own behoof.

When the Beneficiary is entitled to demand a specific conveyance.

A trustor may of course direct a limited interest to be created for the benefit of one party, leaving the fee or reversionary interest to another, or to his heirs-at-law; and such directions must be literally fulfilled. Thus, if a trustor direct a conveyance to two parties, jointly or severally, the duty of the trustee is not to divide the estate, but to execute a *pro indiviso* conveyance to the beneficiaries for their respective interests (a). The legal character of the interest must of course be kept in view in any proceedings that a beneficiary may adopt for making up a title to his interest in the estate.

Beneficiary cannot insist on a conveyance to the injury of the interests of other Beneficiaries.

Where, on the other hand, the testator has directed his trustees to convey the estate to the beneficiary unconditionally, the Court

But a gift of a fee-simple interest en-

(a) *Watson v. Crawcour*, 21 Nov. 1856, 19 D. 70.

titles the
Beneficiary
to demand the
specific estate.

When Annui-
tants are en-
titled to have
their interests
secured on the
estate.

How the
Beneficiary
may enforce
his right to a
specific con-
veyance
against the
Trustee.

will not cut down the right of the latter to a superiority (a), life-rent (b), or other limited interest, upon mere indications of intention gathered from the context. In that case, accordingly, the beneficiary may proceed at once to adjudge the estate from the trustee.

If a beneficial estate is burdened with payment of an annuity, it is a question of construction upon the terms of the trust deed, whether the annuity is to be secured upon the fund, or left upon the footing of a personal obligation against the beneficiary. For example, in the case of *Stainton v. Stainton's Trustees* (c), the Court held that a widow was entitled to have her provisions made a burden upon a conveyance of heritable estate, which the trustees were directed to execute in favour of the heir; while in the case of *Kerr v. James* (d), it was held that the intention was to impose a personal obligation upon the residuary legatee for the benefit of the annuitant, and the trustees were accordingly ordained to pay over the fund to the residuary legatee without exacting security. The principle is illustrated also by the case of *Stewart's Trs. v. Stewart* (e), where a testator having directed a conveyance of the fee of his estate to his children, with a substitution to the survivors in the event of their dying without issue, but limiting his daughters' interest to a life-rent, it was held incompetent to insert in the destination to the daughters a power of disposing of their shares in the event of their dying without issue.

There is nothing peculiar in the form of diligence by which a beneficiary may complete his title to the *ipsum corpus* of the estate during the lifetime of the trustee. The heritable estate may, in the event of the trustee refusing to convey, be attached by a declarator of trust, with conclusions for adjudication in implement (f). Moveable property may be attached by diligence obtained in pursuance of a decree of denuding. In either case, the action is directed against the trustee, and the effect of the diligence is to transfer the estate from the person of the trustee to that of the

(a) *Anderson v. Bank of Scotland*, 7 June 1842, 4 D. 1874.

(b) See the cases collected *antea*, Chapter VII. Section 2.

(c) *Stainton v. Stainton's Trs.*, 25 Jan. 1850, 12 D. 572.

(d) *Kerr v. James*, 12 Feb. 1858, 20 D. 563.

(e) *Stewart's Trs. v. Stewart*, 20 Dec. 1851, 14 D. 298.

(f) *Waddell v. Rymer*, 9 July 1833, 11 S. 949.

beneficiary (a). It is settled by *Gordon's Trs. v. Harper* (b) that a beneficiary, instituted directly or conditionally, does not require to complete a title by service or confirmation in order to put himself *in titulo* to pursue an action of denuding. His title is the conveyance in his favour in the trust deed (c).

The completion of a title to trust property, the title to which has lapsed by the death or non-acceptance of the trustees, requires a more careful consideration.

Completion of title to the equitable estate under a lapsed trust.

In the case of heritable property, the title to the beneficiary is usually made up by declaratory adjudication, which was the form of action suggested by the Court in 1758, in disposing of the case of *Drummond v. Mackenzie* (d), and which in practice has been extended to all cases of lapsed trusts, whether the failure may have arisen through non-acceptance, death, supercession of the trust, or any other cause.

Heritable property. Declaratory adjudication.

In a recent case (e), the question was very anxiously considered by the First Division, whether a moveable interest in heritable property, and falling by the legal course of succession to the next of kin of a beneficiary, could be taken up by declaratory adjudication. The question arose in this way: The curator of an insane person had invested his ward's funds on heritable security. The succession of course remained moveable, although the subject to which a title was to be made up was heritable. The question arose in the shape of an objection taken by a purchaser to the beneficiary's title, which had been completed by declaratory adjudication in the circumstances referred to; but as that objection was taken in a Sheriff Court action, a majority of the judges of the First Division, before whom the case came on advocacy, held that the decree of declaratory adjudication, being the decree of a superior Court, could not be challenged in the Sheriff Court; and that they were therefore relieved from the necessity of deciding this interesting question of conveyancing on its merits.

Completion of title by declaratory adjudication to a moveable interest in heritable property.

(a) See Chapter XXX. Section 4.

(b) *Gordon's Trs. v. Harper*, 4 Dec. 1821, F. C., and 1 S. 199.

(c) As to the completion of a title by substitutes and conditional institutes, see Chapter XXX., p. 127.

(d) *Drummond v. Mackenzie*, 1758, M. 16206; *Dalziel v. Dalziel*, 1756, M. 16204, Appx. Trust, No. 1; see *Black v. Lorimer*, 25 June 1821, 1 S. 521.

(e) *Marquis of Ailsa v. Jeffray*, 15 Feb. 1859, 21 D. 492.

Lord Currie-
hill's opinion,
in *Marquis of*
Ailsa's case,
criticised.

Lord Curriehill, who dissented from this judgment, explained in an elaborate opinion (a) his reasons for holding the title to be inept; and which were in substance, that the right to be adjudged was not a trust, inasmuch as the title to the security stood in the name of the person under curatory, and might have been adjudged as in *hereditate jacente* of the defunct by a *simple action of adjudication*. It appears to us, however, that in the case under consideration, an adjudication without declaratory conclusions would have been open to the objection of want of title. At common law the succession to the bond would have devolved upon the heir. The right of the next of kin arose, not upon any liquid obligation susceptible of being enforced by adjudication in implement, but upon the maxim of equity, that the act of the curator in converting the fund from moveable into heritable estate could not prejudice the right of the next of kin to the succession; and it was necessary that this right should be declared, as a step towards the ultimate conclusion for adjudication. It was justly observed by Lord Deas (b), that the process of declaratory adjudication rested upon the sanction given to that form of proceeding by the Court in virtue of their prætorian power of adapting the forms of process to the requirements of a *casus improvisus*. We may add, that although the right which was the subject of declarator in the cases of *Drummond* and *Dalziel* was different in its inception from that in the *Marquis of Ailsa's* case; yet, as the cases have this element in common, that the pursuer's interest resulted from his legal relation to the party last seised, his right to have that relation ascertained by ancillary conclusions of declarator could not be controverted without disputing the principle upon which that form of action was sanctioned in the cases of *Drummond* and *Dalziel*.

Crawford v.
Earl of Dundonald.

The case of *Crawford v. Earl of Dundonald* (c) seems to be a direct authority in point. Certain parties, who, as next of kin, claimed the succession to a moveable debt, which had been rendered heritable by a decree of adjudication, brought a declaratory adjudication with the view of completing their title to that right. The Court, on a view of the circumstances under which the debt had

(a) 21 D. 500.

(b) 21 D. 503.

(c) *Crawford v. E. of Dundonald*,
22 May 1838, 16 S. 1017. See Bell's
Com., 5th Ed. 35, 751.

been rendered heritable, decided that the right belonged to the heir-at-law, but were of opinion that the action was correct in point of form, supposing that any interest had vested in the pursuers. It had previously been determined in *Gordon's Trs. v. Harper*, that the assignee of a beneficiary might complete his title by a declarator with conclusions for adjudication (a).

Notwithstanding the decisions which have been given on the question, doubts are still entertained in the profession as to the proper mode of completing a title in the person of a fiar, to property in which a liferenter has been infeft for his liferent use allanarly, and his children *nascituri* in fee. Mr Parker, in noticing the class of titles to which the process of declaratory adjudication is applicable, has the following remark: "Where a fiduciary fiar holds the right for behoof of A. and others, it becomes necessary to have it declared who those others are, coupled with adjudication" (b). On the other hand, it has been expressly decided by the case of *Dundas* (c), that the fiar may make up a title to the estate by service as heir of provision, although the liferenter were infeft in the liferent only; and, *a fortiori*, this mode of completion would seem to be competent where, as in the case of *Barstow* (d), infestment has been taken by the liferenter for himself and on behalf of the children; or where, under the modern mode of infestment by registration, the character of the infestment rests upon the footing of the destination in the deed of conveyance. We may add that an infestment in favour of the liferenter and of the children *nascituri*, is really equivalent to an infestment in favour of the liferenter for behoof of himself and his children; for, clearly, real and corporal possession cannot be given to a party unborn. In this case also, service seems to be an appropriate mode of completing the title. We think, however, that a declaratory adjudication is also competent, because the liferenter may be regarded as a trustee of the fiduciary fee, and his death as a lapse of the trust. In practice, the title to a fiduciary fee is not unfrequently com-

Completion of
Fiar's title
under destina-
tion to children
nascituri;

by declaratory
adjudication;

by service as
heir of provi-
sion.

(a) *Gordon's Trs. v. Harper*, 4 Dec. 1821, 1 S. 185.

(b) Notes on Adjud., p. 86, No. 8.

(c) *Dundas v. Dundas*, 23 Jan. 1823, 2 S. 145. In *Andrews v. Laurie* (12 Dec. 1849, 12 D. 344), it

was held that service was a habile mode of completing a title to a right constituted by reserved real burden.

(d) *Barstow v. Stewart*, 18 Feb. 1858, 20 D. 612. See 1 Fraser, 815, and cases there cited.

pleted in this manner; and in some cases, where the beneficial interest has been much divided, an adjudication may be more convenient than the completion of separate titles by service to the shares of the different beneficiaries.

Completion
of title to
personalty
under lapsed
trust, by con-
firmation;

The title to a lapsed trust of personal estate may, if the beneficial interest is in the next of kin of the truster, be taken up by confirmation in that character (a). Where the beneficiaries are not of the next of kin, it has been suggested that they might make up a title by confirmation as executors-creditors of the trustee, supposing the lapse to have arisen in consequence of his death after acceptance; but unless we assume that a trust is an *inheritable right* (which it clearly is not), this course would seem to be incompetent, since confirmation can only be used to take up an inheritance. In the case of a lapse by non-acceptance on the part of the trustees, the beneficiaries might confirm to the truster in the character of legatees. In the case of a lapse by death, the title might be completed by confirmation to the truster, *ad omissa vel non executi* (b).

by adjudica-
tion.

In *Gavin v. Kirkpatrick* (c), it was decided that the right of beneficiaries who had confirmed to the lapsed succession *qua* next of kin might be attached by adjudication at the instance of a creditor. We incline to think that even in the case of a purely moveable, and *a fortiori* in the case of a mixed heritable and moveable succession, adjudication, as a catholic diligence, might be resorted to with propriety for the purpose of vesting the *universitas* of the succession *in persona* of one or more beneficiaries.

Completion of
titles by Judi-
cial Factor.

In the preceding observations it is assumed that the trust is in a situation to admit of an immediate distribution or conveyance of the estate. But where there are contingent interests to be protected, or discretionary powers to be exercised, it would not be safe to rely either on confirmation or declaratory adjudication as a title of intromission; and the proper course in such cases is to have a judicial factor appointed to execute the trust, who may complete a title in his person under the Titles to Land Acts (d), and convey the estate at the proper time to the parties entitled to it.

(a) *Gavin v. Kirkpatrick*, 30 May 1826, 4 S. 629.

(b) See *Nicol v. Wilson*, 10 June 1856, 18 D. 1000.

(c) *Gavin v. Kirkpatrick*, *supra*.

(d) 23 & 24 Vict. cap 143, § 38,

amending 21 & 22 Vict. cap. 76, § 21.

In the case of a trust lapsing by the death of the trustees, if the trust conveyance includes a destination over to the heir of the last surviving trustee, a title to the equitable estate may be made up by conveyance from the trustee's heir, if he is willing to serve (a). In the Commissary Court of Edinburgh, the heir of line is held to be the only party entitled to serve in virtue of a destination to the heirs of a surviving trustee; and this, irrespective of the consideration whether the trust estate consists of heritable or moveable property. A general service vests in the heir a title to the moveable estate to which the trustees have confirmed; though the heir may with propriety confirm as executor *ad omissa vel non executata*. In a case where the heir of a last surviving trustee had made up a title, but died during the dependence of the suit, Lord Ardmillan held that the beneficiaries were entitled to sist the next heir, he having previously served heir of provision to the truster (b).

Completion of title by conveyance from the Heir of the last surviving Trustee.

The radical or reversionary interest of the truster under a trust conveyance *inter vivos*, stands on his own title. His heir may, therefore, complete a title to it directly by serving heir to his ancestor (c).

Completion of title to Truster's reversionary interest.

As a trust is only a personal interest, it may be extinguished by discharge, the effect of which is simply to put an end to the particular right, leaving the estate subject to the more general destination of the trust settlement, in so far as that may be applicable. Thus, if one of two beneficiaries having a joint interest in an estate renounce his interest, it will devolve *jure accrescendi* upon his co-beneficiary (d). The discharge of a liferent interest has the effect of disburdening the equitable estate; and therefore, if the fiar have previously acquired a vested interest, he will then be *in titulo* to demand a conveyance in fee-simple (e). Where, on the other hand, the beneficial interest in a subject is held by two persons in severalty, and one of them discharges his right, the benefit of the lapse will accrue to the general estate (f).

(a) See Chapter XV. *supra*, I. 302.

(b) *Blackwood v. Brewster*, decided by Lord Ardmillan, 25 June 1862.

(c) See Chapter XXXIII., p. 171.

(d) *Gillespie v. Robertson*, 11 Mar. 1824, 2 S. 795.

(e) *Pretty v. Newbigging*, 2 Mar. 1854, 16 D. 667; *Annandale v.*

M'Niven, 9 June 1847, 9 D. 1201;

Ker v. Wauchope, 5 May 1819, 1 Bligh, 1. See Chapter XLV.

(f) *Breadalbane Trs. v. Pringle*, 15 Jan. 1841, 3 D. 357; see the principle stated by Lord Medwyn, pp. 363-4.

CHAPTER XXXIII.

OF THE TRUSTER'S REVERSIONARY INTEREST.

Trusts which burden the interest of the Truster distinguished from those which divest him.

WE have already had occasion to refer more than once to the distinction—of great practical importance in connection with the law of property—which obtains between trust settlements disposing of the entire interest of the granter in his estate, and those which are constituted for special and temporary purposes, *e.g.*, for the economical management of the truster's property, for the purpose of creating a security, or for payment of the truster's debts (a). The distinction as to the character of the rights created by those two classes of trusts will be better understood when the reader has considered, as we now propose to do, the important consequences which flow from the recognition of the doctrine of the truster's radical or reversionary interest in property which is the subject of disposal under a special trust.

Unless the purposes of a trust exhaust the estate, *prima facie* it is merely a burden, and the Truster retains the radical title.

The principle of the distinction to which we refer may be thus stated. A trust conveyance, being in its own nature but a limited title, does not necessarily import that the truster is divested of the fee or radical title to his property, any more than a disposition in security would import such a divestiture. In both cases, the whole estate is *ex figura verborum* conveyed from the granter to the grantee. In the case of a heritable security, the force of the dispositive words is controlled by the conditions of the instrument whereby the granter's right of redemption is secured; the grantee's interest being limited, in any event, to the value of his debt. In effect, the radical title to the property remains with the granter, although the estate may be pledged by bond and disposition in security for debts greatly exceeding its value. It so remains,

(a) See the principle stated with reference to the title and estate of the trustee, I. 287.

because the conveyance is qualified in such a manner as to leave a reversionary interest in the grantor. For the same reason, a conveyance to a donee *in trust*, with an ultimate purpose of reinstating the grantor in his property, does not divest him. The difference between the two cases amounts to this, and no more, that under a security title the grantee holds the estate for the purpose of satisfying liabilities incurred by the grantor to the grantee himself; under a trust disposition in the form we are considering, the grantee holds the estate for the liquidation of liabilities incurred to third parties. In neither case is there any purpose of parting with the property further than may be needful to constitute a security; and accordingly, in regard to both, the theory of the law is, that a conveyance so restricted is a mere burden which may be extinguished by discharge, and during the subsistence of which the grantor is *in titulo* to deal with the estate in the character of heritable proprietor; although the extent of his beneficial interest is limited by the real burden which he has created over it.

Analogy between trusts and heritable securities.

Although, however, the primary purposes declared by a trust disposition are the payment of debts and the economical management of the estate, yet, if the ultimate purpose is not the retrocession of the grantor, but the conveyance of the residuary estate to a third party, then the estate taken by the trustee is no longer a burden, but a trust of the fee. Here the radical interest is in the equitable donee of the surplus estate, just as in the former case the radical interest was in the grantor, as being the party entitled to the surplus after fulfilment of the purposes. The distinction between the two cases concerns the *title*. In the case of a conveyance to a trustee with an ultimate destination to the use of a beneficiary, who is neither in possession nor *in titulo*, the full legal or radical title to the estate passes from the truster to the trustee; whereas, in the case of a trust which contemplates the retrocession of the truster, no higher title passes to the trustee than is necessary for the execution of the special trusts with which he is clothed, and the radical title, as well as the radical right, remains in the truster.

If the reversion is disposed of in the trust deed, the radical title is held to be transferred.

The position of a trustee under a trust which does not dispose of the reversionary interest, or disposes of it only by directing a reconveyance to the grantor, is not materially different from that of a factor holding a power of attorney, as regards the relation subsisting

Trust distinguished from factory. Trusts which do not divest the grantor are operative as real securities.

between grantor and grantee. There is, however, a marked difference as regards the rights conferred upon the creditors. By means of a trust conveyance, a real security is constituted, giving the creditors for whose benefit the trust is created a preference in bankruptcy. This circumstance throws some light upon the nature of trusts for the payment of creditors, which may be defined as a species of real security combined with mandate.

In the sequel of this chapter we shall, after noticing the leading cases upon the doctrine of the truster's reversionary title and interest, and the modifications of that interest with reference to particular forms of disposition, consider more particularly, first, the powers of the truster during the subsistence of the trust, and after its termination; and secondly, the rights of his creditors.

*Campbell v.
Edderline's
Creditors.*

The first case demanding our attention is that of *Campbell v. Edderline's Creditors* (a), which established the principle, that in the case of a truster retaining a reversionary interest in his estate, the radical title remained in his person, notwithstanding the execution of a formal dispositive conveyance to a trustee for the benefit of creditors, with an executory destination intended to take effect after death. In this case, the truster's heritable estate was by the form of the settlement conveyed to trustees absolutely and irredeemably, for behoof of the whole of his creditors. For this purpose, the trustees were invested with a power of sale, and they were directed to entail the residue after payment of the truster's debts. The deed was declared irrevocable *until* the whole purposes of the trust should be fulfilled. After the truster's death, adjudications were led by several of his creditors proceeding upon charges against the heir-at-law. In a competition between those creditors and a creditor leading an adjudication against the trustee, it was maintained by the latter that the truster was completely divested of his lands by the trust deed, and that the only regular adjudication was that which had been led against the trustee; but the Court found that the proprietor was not completely divested of the real right and property of his estate by the trust right and infeftment thereon, the same having been in trust for the grantor's behoof, as the trustees "stood bound, in the event of a sale, to reconvey or settle the remainder for behoof of the grantor and his heirs, which did

Competent to
adjudge rever-
sion from the
hereditas of
Truster.

(a) *Campbell v. Edderline's Crs.*, 14 Jan. 1801, M. "Adjudication," No. 11.

not disable his lawful creditors, not acceding to the trust deed, from doing diligence against himself while he lived, or against his apparent heir after his death, for payment or security of their debts."

The question, which had been considered by the profession to have been settled for more than thirty years, was again raised in the case of *M'Millan v. Campbell* (a). In this case, the settlor, Mr Campbell of Combie, had executed a trust in favour of a trustee named in the settlement, whom failing, to such other person as might be appointed by his creditors, with power to sell and dispose of lands at his own discretion, upon trust to pay all the settlor's debts, and thereafter to make payment to the settlor, his heirs or assignees, of the residue of his funds, and also to reconvey the lands, in case any part thereof should remain unsold. In terms of these instructions, a reconveyance was executed by the trustee in favour of Mr Campbell, who soon after executed an entail of the lands in the form of a procuratory of resignation. A reduction was afterwards brought by certain creditors of the entailor's son, who, founding upon a flaw in the title which Mr Campbell had obtained from his trustee, maintained that the trust deed had completely divested the granter, and that at the time of executing the entail, he was not vest and seised in the estate. The judgment of the Court of Session was, "That David Campbell, not having been divested by the trust deed, had power to execute the procuratory of resignation containing the entail, and that the titles made up under it were validly and feudally made up." This judgment was affirmed by Lord Wynford, on the ground that the principle had been settled by decisions which had been generally approved by the profession.

M'Millan v. Campbell.

Truster possessing upon his radical title may create an entail of the legal estate.

It is of course implied in the principle of those decisions, that the granter may recal or discharge a trust executed for behoof of his creditors, by paying or satisfying the liabilities which it was intended to secure. He cannot put an end to the security thereby conferred on the creditors specified in the deed, or acceding to it, except by satisfying their claims or obtaining a discharge of their interest in the trust; but, subject to their rights, he may dispose of

Truster retaining the reversionary interest may, on fulfilling the trust purposes, require the Trustee to discharge the trust.

(a) *M'Millan v. Campbell*, 14 Aug. 1834, 7 W. & S. 441, affg. 9 S. 551; *Bellenden Ker v. Lady Essex Ker's Trs.*, cited by Lord Moncreiff in *M'Millan's case*, 5 S. 937; *Fairlie v. Fergusson*, 11 July 1827, 5

Reconveyance
not essential.

Radical title
may be trans-
ferred by a
settlement of
the reversion
upon the
Grantor's
family.

Clanranald
case.

Trustee infett
in security
of advances
taken bound
to convey to
Heirs of mar-
riage on the
expiration of
the trust.

the estate at pleasure (a). The trustee's discharge is sufficient to put an end to the trust; and a reconveyance would be superfluous.

If, on the other hand, an irrevocable interest in the reversion is given to a third party, the grantor is held to be completely divested as to that part of the property, insomuch that even though his life interest is reserved to him, he cannot rescind the trust, or require the trustees to reconvey to himself. A familiar illustration of this principle is furnished by the case of marriage-contract trusts for behoof of the grantor's family. It is obvious that in such a case the addition of a purpose of payment of debts would not alter the character of the settlement. It is not necessary that the deed should be onerous, to make it irrevocable; on the contrary, the cases cited in a former chapter (b) prove that a trust conveyance for behoof of children may be made irrevocable by a declaration to that effect; and that by delivery the truster is completely divested, and loses all control over his property (c).

Both principles were involved in the leading case of *Herries, Farquhar, & Co. v. Brown* (d). Mr Macdonald of Clanranald executed a trust conveyance of his fee-simple estates, with powers of sale, for payment of debts then existing. The trustee was bound to reconvey the lands, so far as remaining unsold, or the reversion of the price, to the truster, or to any party named by him, on being "relieved of the whole engagements he may have come under in consequence hereof." On the occasion of the truster's marriage, a sum of £10,000 was paid to the trustee for the purposes of the trust, who thereupon consented to Mr Macdonald infetting himself and the heir-male of the marriage, and other heirs, under the conditions of a strict entail, "but subject to the trusts and purposes specified in the said trust deed;" and the trustee further bound himself to denude on the expiration of the trust. In an action by subsequent creditors of the truster, which was referred to the whole Court, it was held by a majority of the judges (in conformity with the principles already laid down as to the grantor's reversionary

(a) See *Herries, Farquhar, & Co. v. Brown*, 9 Mar. 1838, 16 S. 948.

(b) Chapter IV. Section 4 (I. 68-70).

(c) *Smitton v. Tod*, 12 Dec. 1839, 2 D. 225; *Turnbull v. Tawse*, 15 Apr. 1825, 1 W. & S. 80, revg. 2 S. 1;

Wright v. Harley, 2 June 1847, 9 D. 1151; *MacGibbon v. MacGibbon*, 5 Mar. 1852, 14 D. 605.

(d) *Herries, Farquhar, & Co. v. Brown*, 9 Mar. 1834, 16 S. 948.

interest), first, that the trustee was bound to denude in such manner as to secure the succession to the heirs of entail; and secondly, on the principle that an irrevocable interest was given to the heirs of the marriage, it was held that subsequent creditors were not entitled to do any diligence against the said lands, or the price thereof, so as to affect the rights of the heirs of the marriage (a). In the subsequent case of the *Globe Insurance Co. v. Murray* (b), where the truster had executed an additional deed of trust on the occasion of his daughter's marriage, in which he adopted a previous settlement of his property in the form of a strict entail, and became a party to his daughter's contract of marriage, which conveyed the daughter's interest under the settlement and entail, it was held that the truster had not undertaken an onerous obligation with reference to his property, and was therefore not divested in such a way as to exclude the diligence of subsequent creditors. The consent given in this case to the daughter's conveyance of her interest, was obviously very different in its legal effect from the direct conveyance of the estate to the heirs of the marriage, which was the distinguishing feature in the *Clanranald* case.

Found, that the Trustee held the reversionary estate for the benefit of the heir; and diligence of Truster's Creditors excluded.

Although, as a general rule, a party can neither create a trust for his own behoof so as to exclude the diligence of his creditors (c), nor deprive himself of the power of revoking a deed in which he retains the sole beneficial interest (d), the rule has, from favour to married women, been so far relaxed, that a conveyance in an antenuptial contract of the lady's property to trustees for her separate use, is irrevocable during the subsistence of the marriage (e); but the wife's radical title revives after the dissolution of the marriage, if she survive her husband.

Torry Anderson's case.

Marriage-contract trust for Wife's separate use irrevocable *stante matrimonio*.

A marriage-contract may reserve power to the spouses, or to their trustees with their consent, to sell the property and reinvest the price; in which case the power may be exercised by a judicial

Reserved power in marriage-contract trust to sell and reinvest, etc.

(a) 16 S. 982.

(b) *Globe Ins. Co. v. Murray*, 15 Dec. 1854, 17 D. 216.

(c) *Earl of Roseberry v. Cowie*, 1 July 1823, 2 S. 443.

(d) *Per curiam in Torry Anderson's case, infra*; *Murison v. Dick*, 10 Feb. 1854, 16 D. 529.

(e) *Torry Anderson v. Buchanan*, 2 June 1837, 15 S. 1073. The trust, however, may be revoked by the wife after the dissolution of the marriage (*Cunninghame v. M'Leod*, 13 Aug. 1846, 5 Bell, 210, affg. 3 D. 1288). The cases are commented on in the next chapter.

factor on failure of the trustees (a). Where a power was reserved, in a marriage-contract, to the spouses or the survivor to sell the wife's property, should they find it necessary for their support to do so, the lady's heir was held entitled to reduce a gratuitous conveyance by the husband (b).

Trustee under an *ex facie* absolute conveyance has the radical title;

even although the purposes, as declared in a separate writing, do not exhaust the estate;

Robertson v. Duff;

What has been already said regarding the subsistence of the truster's title, notwithstanding the execution of a trust for payment of debts, must be understood to apply only to conveyances which are declared to be in trust *in gremio* of the deed of conveyance. With respect to unrecorded *ex facie* absolute conveyances—*e.g.*, for constituting an indefinite security for advances—it is clear that the truster is completely divested, his interest being reduced to a personal and contingent right to demand a reconveyance upon payment of all advances made subsequent to the disposition (c). In a case of this nature, it was expressly laid down that the trustees had the radical right to the property (d). And even where the purposes of the trust, being of a more limited character, are declared in a separate writing, there can no longer be any doubt that an *ex facie* absolute disposition operates as a deed of divestiture, on the principle that it is of the essence of such a title that all the consequences legally deducible from it should receive full effect, and that all other interests are subordinated to that of the nominal proprietor, and reduced to the level of personal rights.

The distinction was very clearly brought out by Lord Fullerton in *Robertson v. Duff* (e), where the question was as to the extent of the disponee's interest. "It is settled," said his Lordship, "that there is an important distinction between a disposition which *in gremio* contains a trust, and sets forth certain specific trust purposes, and a disposition which is *ex facie* absolute, but is qualified by a separate back-bond by the disponee, containing a general declaration of trust. The first does not divest the granter, but merely burdens his right; the latter does divest him, leaving him merely

(a) *Muller v. Dixon*, 11 Feb. 1854, 16 D. 536.

(b) *Collart v. Corrie*, 26 Mar. 1853, 15 D. 606.

(c) *M'Lelland v. Bank of Scotland*, 27 Feb. 1857, 19 D. 574; see *Brough v. Jolly*, 1793, M. 2585; *Leckie v.*

Leckie, 21 Nov. 1854, 17 D. 81; *Walker v. Buchanan, Kennedy, & Co.*, 11 Dec. 1857, 20 D. 259.

(d) 19 D. 581, per Lord President M'Neill.

(e) *Robertson v. Duff*, 14 Jan. 1840, 2 D. 279.

the creditor on the trustee's obligation to reconvey" (a). It was at one time considered doubtful whether this exception was not confined to the case where the disponee was infert, and the interest of the truster remained personal on an unrecorded back-bond; but since the decision of the whole Court in *Gardyne v. The Royal Bank of Scotland* (b), where a creditor, notwithstanding he had recorded a back-bond of trust relative to the disposition, was held to have incurred liability as a legal proprietor, we think it must be taken as a perfectly general proposition, that a trustee possessing on an *ex facie* absolute conveyance has the radical title.

and although both titles are recorded.

Observing upon *Gardyne's* case, Lord Ivory said (c), that the distinction between a disposition *ex facie* absolute and the other forms of security known to law, was very distinctly brought out in the case of *Gardyne v. The Royal Bank*, where the doctrine held by the majority of the Court was not touched by the reversal, viz., that it is of the essence of a title *ex facie* absolute that all the consequences lawfully deducible from it should receive effect. In the case of an ordinary security, the original investiture of the party granting the security reserved his radical title to the estate, and the security was a mere burden. But if, on the contrary, the proprietor divested himself by disposition *ex facie* absolute, he no longer remained proprietor of the estate. He had a radical interest in the estate, but not the radical title; and it was through the party to whom he had conveyed it that he must obtain a reconveyance and retrocession of his rights.

M'Lelland v. Bank of Scotland.

The delivery of an *ex facie* absolute disposition, no matter how qualified, *ipso facto* divests the Granter of his title.

Where there are two conflicting titles of fee in the same estate, it is often a matter of difficulty to determine which of the two ought to be considered a burden upon the other. The case of security titles, to which we have just referred, is one, but not the only example of the difficulty. Another class of cases equally perplexing, is that of an entail and a trust right created by the same party, and subsisting contemporaneously. It has been usual to regard the trust as the subordinate right, even though it absorbs the entire revenues of the estate during the period of its subsistence: and this

Double trusts of same estate. Difficulty in determining in which party the radical title resides.

(a) 2 D. 291.

(b) *Gardyne v. Royal Bank of Scotland*, 8 Mar. 1851, 18 D. 912, decided

by the whole Court; reversed upon another ground, 1 Macq. 358.

(c) *M'Lelland v. Bank of Scotland*, *ut supra*, 19 D. 588.

seems agreeable to reason; for the entail is the more permanent interest, and inheritable; while the trust is in its nature temporary, and is, when coupled with an entail, designed in almost all cases to be ancillary to the ultimate settlement of the succession. This accordingly was the view taken of the reciprocal relations of two such coincident rights in the *Strathmore* succession case (a), in the *Clanranald* case (b), and in *M'Millan v. Campbell* (c). But in *Melville v. Preston* (d), the trust was held (we think erroneously) to be the leading title. What the Court really decided was, that although infestment had been taken on a deed of entail after the settlor's death, the trustees were entitled, in virtue of a power to that effect, to complete a feudal title to the estates,—and it is clear that they were entitled to have their right perfected by sasine, on any view of its nature. The judges, however, seem to have assumed, that the appropriation of the revenues to the purposes of the trust was sufficient to reduce the right of the heirs of entail to the position of a burden,—a ratio which would equally apply to the case of a proprietor whose rents are absorbed by a trust *inter vivos*. The fact that in *Preston's* case the right of entering vassals was expressly reserved to the heirs of entail, ought, we think, to have been held sufficient evidence of an intention to give the heirs the status of heritable proprietors from the outset.

Illustrations of
the Truster's
radical in-
terest.

The nature of a truster's reversionary interest in his estate may be further illustrated by a variety of cases in which it has been recognised in competition with other rights; for example, in questions between the trustee and purchasers (e) or borrowers (f) from the granter, or adjudgers of his interest (g); in questions between the granter and the creditors of the trustee (h); and in questions

(a) *Strathmore v. Strathmore's Trs.*, 23 Mar. 1831, 5 W. & S. 170.

(b) *Herries, Farquhar, & Co. v. Brown*, 9 Mar. 1838, 16 S. 948.

(c) *M'Millan v. Campbell*, 4 Mar. 1831, 9 S. 551. See also *Macrae v. Macrae*, 27 June 1839, 1 Robinson, 645, affg. 15 S. 54.

(d) *Melville v. Preston*, 8 Feb. 1838, 16 S. 457, affd. 29 Mar. 1841, 2 Rob. 45. See also *Douglas & Co. v. Glassford*, 10 June 1825, 1 W. & S. 323.

(e) *Barbour v. Bell*, 25 Jan. 1831, 9 S. 334; *Brisbane's Trs. v. Crawford*, 3 Feb. 1826, 4 S. 422.

(f) *Lindsay v. Giles*, 27 Feb. 1844, 6 D. 771.

(g) *Campbell v. Edderline's Crs.*, 14 Jan. 1801, M. Adjud. No. 11.

(h) *Paul v. M'Leod*, 20 May 1828, 6 S. 826; *Gordon v. Cheyne*, 5 Feb. 1824, F. C. The rule, however, is otherwise in the case of latent trusts; *Sommerville v. Redfearn*, 1 June 1813,

between the truster's heirs-at-law and the grantees under conveyances executed by the truster before being retrocessed (*a*). It has been decided that the truster, and not the trustee or beneficiary under a trust *inter vivos*, is the party entitled to vote in the election of a member of Parliament (*b*). In all questions as to the right of property which is the subject of the trust, the truster, if he retains his radical interest, is a necessary (*c*), and generally the only necessary defender (*d*). The truster's heir must make up his title by service; and unless he does so, the radical title remains in the *hereditas jacens* of the truster, and passes to the next heir (*e*).

The powers of the truster in virtue of his radical title are as extensive as those of the proprietor of a fee-simple estate unburdened; for example, he may sell (*f*); borrow on the security of the estate (*g*); grant leases, unless restricted by the trust (*h*); and dispose of the universitas of the reversionary estate by testamentary settlement (*i*) or marriage-contract (*k*). It has been expressly decided that he may execute an entail of the estate by direct conveyance, without the intervention or consent of the trustee (*l*). The truster is entitled to sue and defend actions regarding the estate (*m*),—a right which also belongs to a bankrupt whose affairs are under trust in virtue of the legal diligence of sequestration (*n*). Finally, he has the right of demanding a reconveyance from the trustee after the purposes of the trust have been fulfilled (*o*); and

Powers of a
Truster retain-
ing the radical
title.

5 Paton, 707, revg. M. "Personal & Real," No. 8; *Dingwall v. M'Combie*, June 1822, 1 S. 463.

(*a*) *M'Millan v. Campbell*, 14 Aug. 1834, 7 W. & S. 441.

(*b*) *M'Leod v. M'Kenzie*, 17 Nov. 1827, 6 S. 77; *Lockhart v. Wingate*, 19 Feb. 1819, F. C.

(*c*) *Bell v. Maxwell*, 13 Dec. 1828, 7 S. 198.

(*d*) *Meiklam v. Glassford*, 4 Dec. 1831, 14 S. 137.

(*e*) *Broughton v. Fraser*, 3 Mar. 1832, 10 S. 418.

(*f*) *Barbour v. Bell*, 25 Jan. 1831, 9 S. 334.

(*g*) See *Innes v. Innes*, 18 Dec. 1828, 7 S. 206; *Lindsay v. Giles*, *supra*.

(*h*) As to the powers usually given, see *Melville v. Preston*, *supra*.

(*i*) *Renton v. Girvan*, 20 Dec. 1833, 12 S. 266.

(*k*) *Herries, Farquhar, & Co. v. Brown*, 9 Mar. 1838, 16 S. 948.

(*l*) *M'Millan v. Campbell*, 14 Aug. 1834, 7 W. & S. 441.

(*m*) *Bell v. Maxwell, Meiklam v. Glassford*, *supra*. See *Thornton v. Thornton*, 25 Nov. 1845, 8 D. 87; *Meggett v. Campbell*, 4 June 1838, 11 S. 675.

(*n*) *King v. Wieland*, 25 May 1858, 20 D. 960; *Mackenzie v. Smith*, 26 June 1861, 23 D. 1201.

(*o*) *Walker v. Buchanan, Kennedy, & Co.*, 11 Dec. 1857, 20 D. 267; *Martin v. Thoms*, 8 Dec. 1856, 15 S. 227.

after retrocession and discharge, his right to the estate cannot be challenged by the creditors, except on the ground of fraud (a). The trustee is at the same time liberated by the force of the reconveyance from all his engagements to the truster, and from all liabilities to third parties, for contracts or transactions subsequent to the reconveyance (b).

Interest of
the Truster's
Creditors in
the reversion-
ary estate.

Subsequent
Creditors.

The right of the truster's creditors to attach the estate for the purpose of securing the reversionary interest, depends partly on the question, whether the truster has been divested. In a former chapter, we have seen that creditors whose rights are anterior to the trust, are entitled to claim the benefit of the trust conveyance at any time before the final distribution of the estate (c). With regard to creditors whose rights are subsequent in date to the constitution of the trust, the truster's interest is the measure of that of the creditors. If the radical title remains in his person, the reversion may be attached by adjudication at the instance of subsequent creditors (d); and although, as in the case of a trust created by an *ex facie* absolute disposition, the truster has only a personal right to demand a reconveyance, that right is still heritable and adjudgeable. And in either case it would seem that a subsequent voluntary conveyance of the reversionary interest to a trustee for behoof of the postponed creditors, is a perfectly competent proceeding (e). If, on the other hand, the truster is entirely divested, which can only happen when his residuary interest is not only disposed of, but taken out of his possession by a delivered conveyance of the reversionary interest to beneficiaries, or to a trustee for their behoof, followed by possession (f), then, as the granter can no longer qualify either a title to, or an interest in the estate, it is necessarily and effectually placed beyond the reach of his creditors (g).

(a) See *Whyte v. Knox*, 26 May 1858, 20 D. 970.

(b) See *Wilson v. Alexander*, 1 Mar. 1803, M. 13968.

(c) Chapter XIX. Section 2, (I. 416); *Pagan v. Eaton*, 17 Jan. 1823, 2 S. 125.

(d) *Campbell v. Edderline's Cr.*, *supra*; *Herries v. Burnett*, 20 Nov. 1846, 9 D. 111; *Barbour v. M'Minn*, 7 July 1826, 4 S. 806; *Renton v. Girvan*, 20 Dec. 1833, 12 S. 266.

(e) See Bell's Com., 6th Ed., 851.

(f) *Turnbull v. Tawse*, 15 April 1825, 1 W. & S. 80; *Fairlie v. Ferguson*, 11 July 1827, 5 S. 937; *Globe Ins. Co. v. Murray*, 15 Dec. 1854, 17 D. 217; *Graham v. Forbes*, 5 Mar. 1829, 7 S. 543.

(g) *Wright v. Harley*, 2 June 1847, 9 D. 1151; *Smitton v. Tod*, 12 Dec. 1839, 2 D. 225.

CHAPTER XXXIV.

OF THE SEPARATE ESTATES OF MARRIED WOMEN.

THE practice of settling the property of married women to their separate use, exclusive of the husband's marital rights, is not of great antiquity. Lord Stair denied the possibility of excluding the husband's proprietary rights; alleging as a reason, that "the very right of the reservation becomes the husband's, *jure mariti*, and makes it illusory and ineffectual—as always running back upon the husband himself—as water thrown upon a higher ground doth ever return" (a). But such notions, which originated in times when justice was imperfectly administered (b), have long since been discarded; and the settlement of the wife's estate by marriage-contract, to the exclusion of the husband's rights, has received the sanction of the Courts of law, as the proper mode of securing her interest from the operation of the rule of law, under which the whole of the wife's personal property, as well as her life interest in lands, are made subject to the diligence of the husband's creditors (c).

Origin of the practice.

It is, however, not a little remarkable, considering the liberal spirit of the Scotch law as to marriage-contracts,—as evinced by the facilities which it affords for the conferring of a *jus crediti* upon wives and children by such contracts—that the Courts should have altogether ignored (d) the right, to which a married woman may fairly lay claim upon equitable grounds, to have an alimentary allowance

Wife has no claim to a settlement out of her property at common law.

(a) Stair, 1, 4, 9; Dirleton, *contra*, *voce Jus Mariti*.

(b) See notes on the case of *Nicolson v. Inglis*, 1678, in Elch. Annot. p. 10; and *Fountainhall*, 3 Br. Sup. 469. See also *Sandilands v. Campbell*, 1682, M. 5836; *Vallance v. M'Dowall*, 1709, M. 5840. The competency of such renunciation had previously been sus-

tained in *Collington v. Collington*, 1667, M. 5828.

(c) See Ersk. 1, 6, 14; Bankt. 1, 5, 8; Bell's Com. 638; 1 Fraser, 406.

(d) *Turnbull v. Turnbull's Cr.*, 1700, M. 5895; *Robb v. Robb's Tr.*, 1794, M. 5900; but see Bell's Pr. § 1944; *Anderson v. Pitcairn*, 8 June 1839, 1 D. 890.

secured to her out of her patrimonial estate, preferable to, or at least co-ordinate with that of the husband's creditors (a). This defect in

(a) In England the jurisdiction to compel the husband, or those claiming under him, to make a settlement upon the wife, was assumed by the Court of Chancery in cases where it was necessary to apply to that Court for assistance in order to obtain possession of the wife's property (1 Wh. & T. L. Ca. 362); when the Court, acting on the maxim that he who seeks equity must do equity, refused to interfere unless a provision were settled on the wife in fulfilment of the husband's duty of providing for her (*Bosville v. Brander*, 1 P. Wms. 459). The wife's equitable right arising in such circumstances was called her *equity to a settlement*.

The doctrine has since been greatly extended. It is now competent to the wife to assert her right actively, and not merely *ope exceptionis* (*Elibank v. Montolieu*, 5 Ves. 737; 1 Wh. & T. 341; see *Newenham v. Pemberton*, 1 De G. & Sm. 644). The wife's equity to a settlement is binding not only on the husband, but upon his *assignees* in bankruptcy, or under a general trust for payment; and it may be made to affect *legal* as well as *equitable* interests, if the property should become the subject of a Chancery suit (*Sturgis v. Champneys*, 5 My. & Cr. 97; where all the previous authorities are cited by Lord Cottenham). See also *Hanson v. Keating*, 4 Hare, 1, decided by Sir J. Wigram. A wife is entitled to a settlement out of property to which she becomes entitled before, as well as after marriage (*Barrow v. Barrow*, 18 Beav. 529).

Where the wife insists for her equity, it is extended to her *children*; and the Court direct a reference or remit to ascertain what is a proper settlement to be made upon her and her children (*Elibank v. Montolieu*, *ut supra*; *Johnson v. Johnson*, 1 J. & W. 472).

But if the wife has died without asserting her right, the children have no claim (*Scriven v. Tapley*, 2 Eden. 337, the leading case; *De la Garde v. Lempriere*, 6 Beav. 344, decided by Lord Langdale).

The questions of greatest importance with reference to the provisions of the Scotch Act of last year (24 & 25 Vict. cap. 86, § 16), relate to the amount and the mode of the settlement. As to amount, the usual practice of the Court of Chancery is to settle one-half of the wife's property upon herself, reserving the other half for the husband or his creditors (see Wh. & T. L. Ca. 381). But in particular circumstances the rule may be varied. In one case, where a husband had separated from his wife, leaving her unprovided for, Sir L. Shadwell, V.C., gave her three-fourths (*Coster v. Coster*, 9 Sim. 597). See also *ex parte Pugh*, 1 Drew, 202; *Vaughan v. Buck*, 1 Sim. N. S. 284. By recent cases it has been settled, after considerable fluctuation, and notwithstanding the authority of an adverse decision by Lord Ch. Sugden (*Napier v. Napier*, 1 D. & W. 407), that the Court may in special circumstances settle the whole fund on the wife; as, for example, where the husband has already received large sums from the wife's father, which have been squandered or applied in liquidation of debt (*Gardner v. Marshall*, 14 Sim. 575); or where the fund is of inconsiderable amount (*in re Kincaid's Trusts*, 16 Jur. 106); or where there has been misconduct on the part of the husband (*Dunkley v. Dunkley*, 2 De G. M'N. & G. 390; *in re Cutler*, 14 Beav. 220; *in re Merri-man's trusts*, 31 L. J. Ch. 367).

As to the mode of settlement, it seems the usual practice of the Court of Chancery is to settle the income of the fund upon the wife to her separate

the common law has at length been remedied by a clause in the Conjugal Rights Act, 1861, which provides, that "when a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf." The amount of the wife's provision is by this section left to the discretion of the Court of Session, to be exercised "with reference to any provisions previously secured in favour of the wife, and any other property belonging to her exempt from the *jus mariti*" (a). But the statutory claim is liable to be defeated by priority of diligence; and it is by a conventional exclusion of the *jus mariti* and right of administration that preferable and fixed provisions can alone be secured to the use of a married woman out of her patrimonial estate (b).

Wife's claim to a settlement under the Conjugal Rights Act.

Wife's claim liable to be defeated by diligence, etc.

The principle of the common law, which, by the fiction of a legal assignation, vests in the husband, for the common benefit, the whole of the wife's moveable property *acquisita et acquirenda*, as well as the usufructuary interest in her heritable estate, does not oppose any theoretical obstacle to a separation of interests, provided the separation be effected by express words of contract anterior to the constitution of the marriage relation (c); and, accordingly, it has long been settled in practice, that an express renunciation or exclu-

Renunciation of marital rights in ante-nuptial contract.

use, and the capital upon the children, payable in the case of sons at majority, in the case of daughters, at majority or marriage (*Gent v. Harris*, 10 Hare, 383, 384; *Francis v. Brooking*, 19 Beav. 349). If there should be no issue, the reversion will be given to the surviving spouse (*Carter v. Taggart*, 1 De G. M'N. & G. 286; *Bagshaw v. Winter*, 5 De G. & Sm. 466).

(a) 24 & 25 Vict. c. 86, § 16.

(b) The provisions of a prior section of this statute, under which a wife deserted by her husband may obtain a decree protecting her property, de-

serve to be noticed under this head. As there are yet no reported cases upon either of the sections, it is unnecessary to do more than simply to refer to the statute. The corresponding English enactment is 20 & 21 Vict. cap. 85, §§ 21-26.

(c) But if the exclusion is by *mortis causa* deed, a later settlement renewing the bequest, without excluding the husband's rights, operates an implied revocation of the excluding provision in the first deed; *Macalister's Trs. v. Macdonald*, 1763, M. 6600.

sion of the *jus mariti* and right of administration, in relation to any particular subject, suffices to protect that property from the deeds of the husband and the diligence of his creditors (a). It was argued with some plausibility, indeed, that however effectual such a clause might be to exclude the rights of the husband's creditors as regards his wife's interest in heritable property, yet that the separation of interests in regard to moveables by a private deed was ineffectual against creditors, who were entitled to rely on the operation of law in effecting a transference of the wife's property to her husband, until intimation was made to the contrary (b). But this technical difficulty was not allowed to stand in the way of the recognition of the wife's right to contract for the reservation of her property to her separate use.

Lord Mackenzie's opinion.

Lord Mackenzie's reply to the argument in question, as stated in the case of *Rollo*, seems to remove the difficulty. "The legal assignation," he said, "of the wife's moveable fortune by marriage to the husband never can be supposed to have existed at all, in contradiction to such conveyances contained in the ante-nuptial contract on which the marriage proceeds. As to intimation, if the *jus mariti* had been expressly excluded, intimation of such exclusion never is held necessary, even to bar the debtors of the wife from paying to the husband, far less to exclude the creditors of the husband from taking the wife's separate estate. No party has a right to assume that a wife was married without a marriage-contract, and that all her moveable property must have passed to her husband by the operation of law. Parties interested must inquire what were the actual conditions of the marriage" (c).

Terms which imply an exclusion of the marital rights.

It would appear that the *jus mariti* may be excluded by implication (d); e.g., by a destination to "the liferent use" of a lady, where

(a) Ersk. 1, 6, 14; Bell, Com., 5th Ed. I. 638; *Sandilands v. Mercer*, 30 May 1833, 11 S. 665; *Murray v. Dalrymple*, 1745, M. 5843; *Dickson v. Braidfoot*, 1705, M. 10396.

(b) *Rollo v. Ramsay*, 28 Nov. 1832, 11 S. 132. As regards corporeal moveables, furniture, etc., there is no doubt that the principle of reputed ownership has been held applicable, and that a conveyance by marriage-

contract of all the husband's furniture, etc., to the wife, is inoperative (see the cases of *Campbell v. Stewart*, and *Brown v. Fleming*, *infra*, p. 179.

(c) 11 S. 134.

(d) See the corresponding English cases cited in 1 Wh. & T. 418; and *supra*, I. 110. No particular words are necessary to limit an estate to the wife's separate use (see Bell's Com. 675).

the property has come from her relatives, or was her own; or by terms importing that her interest is alimentary; for an alimentary provision being *ex sua natura* exclusive of all interests adverse to that of the beneficiary, the use of this term is clear evidence of an intention to exclude the claims of the husband and his creditors (*a*). Bequests and provisions to a married woman "for her own use" (*b*), or prohibiting the husband "to seek the principal sum" during her lifetime (*c*), or declaring that the wife shall enjoy the fund "independent of her then or any future husband" (*d*), or that she shall "choose managers of it" (*e*), have been sustained as exclusive of the marital rights. And where the *jus mariti* is *per expressum* renounced or excluded in relation to the rents of heritable subjects, the addition of general words, such as an exclusion of "all other right and title," or "debaring the husband from any concern" with the funds, will be construed as applicable to the right of administration (*f*). An exclusion of the marital rights in regard to a particular fund, applies to interest as well as principal (*g*).

As the legal assignation of marriage brings under the *jus mariti* the whole of the wife's personal interest in her property, except in so far as it is already excluded, no irrevocable separation of interests can be effected by any act of the spouses after marriage. The parties are no longer in the position of being free to contract, and creditors are entitled to rely upon the continuance of the husband's control over the common property (*h*). But with regard to property acquired by the wife subsequently to the marriage, it is held that an exclusion of marital rights by third parties is effectual, on the principle that the grantor may attach such conditions as he pleases to a gratuitous disposition of his property (*i*).

Husband's rights cannot be effectually excluded after marriage.

An estate for the wife's separate use may be constituted either

Constitution of separate estate by conveyance to the Wife, or to Trustees for her behoof.

(*a*) Per Lord Mackenzie, in *Downie v. Pearson*, *supra*; *Annand v. Chessels*, *infra*.

(*b*) *Stables v. Murray*, 1789, 1 Fraser, 411.

(*c*) *Humbie v. Hume*, 1684, M. 5933.

(*d*) *Commercial Bank v. Black*, 23 June 1842, 14 Jur. 528.

(*e*) *Hunter v. Smith*, 1793, 1 Fraser, 410, note.

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(*f*) *Keggie v. Christie*, 25 May 1815, F.C.; *Gowan v. Pursell*, 17 May 1822, 1 S. 418.

(*g*) *Robertson v. Robertson*, 10 Feb. 1835, 13 S. 442; *Hutchison v. Hutchison's Trs.*, 10 June 1842, 4 D. 1399.

(*h*) Ball's Prin. § 1942; *Shearer v. Christie*, 18 Nov. 1842, 5 D. 182.

(*i*) *Annand v. Chessels*, 24 Mar. 1775, 2 Paton, 369, affg. M. 5844.

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by a conveyance to trustees or to the wife herself, either absolutely (*a*), or in trust for behoof of herself in liferent and her children in fee (*b*), or with such other substitutions as may be desired. A conveyance to the husband and wife jointly for her behoof (*c*), or to trustees for her behoof (*d*), or to the husband and wife in conjunct fee and liferent (*e*), without express words of exclusion, will be equally effectual. It may be observed, however, that in the class of cases in which destinations in conjunct fee and liferent, without restrictive words, have been held to exclude the husband's right of disposal, the interests of the children have very materially affected the rules of construction (*f*); and it would not be safe to trust to the effect of a simple conveyance to trustees for the wife's separate use, unaccompanied by words exclusive of the *jus mariti* and right of administration (*g*).

Exclusion of marital rights in a general conveyance of Wife's property.

It seems at one time to have been held, that the marital rights could not be excluded by a *general* conveyance even in an antenuptial contract; for the *jus mariti* being an interest strongly founded in law, it was thought improper that it should be taken away *per aversionem* or by implication. For this reason an exclusion of the *jus mariti* in a marriage-contract, proceeding on the narrative that the wife was possessed of personal effects to the extent of L.200, was held insufficient to exclude certain furniture which had not been inventoried from the diligence of the husband's creditors (*h*); and a general reservation of the wife's right to her separate property was, on the same principle, disregarded (*i*). But this rule was never extended to the case of a marriage-contract conveyance of a succession to the wife, for her separate use (*k*); and it is now settled that even property to which a wife *might thereafter succeed* is capable of being settled upon herself by anticipation (*l*). In the recent case of *Macdonald v. Loudoun*, a question

Exclusion of Husband's rights in relation to *acquirenda*.

(*a*) *Young v. Loudoun*, 26 June 1855, 17 D. 998.

(*b*) *Annand v. Chessels*, *supra*.

(*c*) *Gairdners v. Royal Bank of Scotland*, 22 June 1815, F. C.

(*d*) *Balderston v. Fulton*, 23 Jan. 1857, 19 D. 293.

(*e*) *Rollo v. Ramsay*, *supra*.

(*f*) See *Fraser v. Brown*, 1707, M. 4259; *Mackellar v. Marquis*, 4 Dec. 1840, 3 D. 172.

(*g*) See *Balderston v. Fulton*, 23

Jan. 1857, 19 D. 293, in which the effect of such a conveyance is commented upon.

(*h*) *Macdonald v. Doig*, 1793, M. 5848; see *Greig v. Wemyss*, 1670, M. 5832.

(*i*) *Cuthbertson v. Pollock*, 1799, Hume, 206.

(*k*) See *Annand v. Scott*, 2 Paton, 369.

(*l*) *Greenhill v. Ford*, 24 June 1824, 3 S. 169; *Hutchison v. Hutchison*, 10

of this nature was considered, having reference to a conveyance of a house and furniture by a third party, executed before the lady's marriage, and "exclusive of the *jus mariti* and right of administration of any husband she may marry." It was held, in a question with a pouncing creditor, that a separate estate had been effectually created; although it was argued with considerable force on the other side, that the husband's possession of the furniture must be presumed to have been in virtue of a right of property (a). On the other hand, it has been decided that an ante-nuptial settlement of household furniture and similar effects (b) by a husband to the wife's separate use, excluding his own *jus mariti*, does not, even when accompanied by an inventory of the property (c), create a separate estate, or even a security in favour of the wife.

Corporeal
moveables.

A simple exclusion of the marital rights by the marriage-contract, although sufficient to protect the wife's property from the diligence of the husband's creditors, by depriving the husband of all his legal interest in it, leaves the wife's powers of disposal unimpaired. The husband has, therefore, still the means of operating upon the property through his moral influence with the wife, which he may wield to his own advantage, and from the operation of which the power of revocation is neither a satisfactory nor a complete protection (d). This source of danger to the wife's interest may, however, be completely obviated by the method of a conveyance to trustees for the wife's separate and exclusive use, and declared to be irrevocable. Although, as a general rule, a party cannot deprive himself of the disposal of his property, except by giving a vested interest in it to another, yet, as this equitable rule is one the benefit of which can only be claimed by the beneficiary or his creditors, it was held that it could not apply to the case of a trust for the preservation of the wife's separate interest *stante matrimonio*; as in this case the preservation of the trust was beneficial to her interests, and its destruction could only benefit the husband (e). This was

Husband's
influence may
be counter-
acted by vest-
ing Wife's
property in
Trustees.

Wife may by
ante-nuptial
contract vest
her own pro-
perty in Trus-
tees.

June 1842, 4 D. 1399; *Babington v. Babington*, 30 June 1840 (decided by Lord Jeffrey), 1 Fraser, 413.

(a) *Macdonald v. Loudoun*, 26 June 1855, 17 D. 998.

(b) *Darling v. Mein*, 20 Dec. 1851, 14 D. 296; *Scott v. Price*, 13 May 1837, 15 S. 916.

(c) *Campbell v. Stewart*, 13 June 1848, 10 D. 1280; *Brown v. Fleming*, 19 Dec. 1850, 13 D. 373.

(d) See, however, *Fernie v. Colquhoun's Trs.*, 20 Dec. 1854, 17 D. 233.

(e) The English doctrine of Fraud upon Marital Powers deserves to be

Torry Anderson's case.

settled by the leading case of *Torry Anderson v. Buchanan* (a), where the doctrine was authoritatively laid down, that a trust constituted in such circumstances, and declared irrevocable, was binding; and it was observed, in the joint opinion of Lord President Boyle and Lords Gillies and Cuninghame, that a condition of this nature was entitled to effect, if it was not plainly irrational or contrary to some well recognised authority or principle of the law. So far from it being repugnant to any known law or authority, they were of opinion that a trust constituted before marriage, and placed beyond the power of recall by the spouses, was highly expedient, and entitled to the utmost support and protection. An opinion, however, was expressed, to the effect that the trust would be revocable after the dissolution of the marriage; a view which afterwards received the sanction of the concurring decisions of the Court of Session and House of Lords in *Cunninghame v. McLeod* (b). The case of *Cunninghame* also decided the point, that a destination to "nearest heirs-at-law" in a marriage-contract was not an onerous gift, and that the granter was at liberty, on failure of issue of the marriage, to convey the lands to parties who were not her heirs-at-law.

Such trusts are revocable after the dissolution of the marriage.

Alienation prevented by alimentary clause.

In place of resorting to a trust conveyance of the wife's estate, the object of protecting her interests against the husband's influence, may, to a certain extent at least, be attained by conveying to the exclusive use of the wife herself, under the conditions already referred

studied in connection with this branch of the law. The doctrine, as settled in the leading case of *Strathmore v. Bowes*, 1 Ves. 22, was thus stated in a more recent case by Lord Langdale: "If a woman entitled to property enters into a treaty for marriage, and, during the treaty, represents to her intended husband that she is so entitled—that, upon the marriage, he will become entitled *jure mariti*; and if, during the same treaty, she clandestinely conveys away the property in such way as to defeat his marital right, and secure to herself the separate use of it, and the concealment continues till the marriage takes place, there can be no doubt but that a fraud is thus practised upon the husband; and he is entitled to relief"

(*England v. Downs*, 2 Beav. 528). The relief is given by setting aside the settlement. See the cases explained in 1 Wh. & T. L. Ca. 333. The only Scotch case raising a question of this nature is *Murison v. Dick*, 9 Feb. 1854, 16 D. 529, where a lady was held entitled to revoke a trust settlement of her estate executed *intuitu matrimonii*, and to resettle her property in a way more agreeable to the wishes of her intended husband.

(a) *Torry Anderson v. Buchanan*, 2 June 1837, 15 S. 1073; see also *Sandilands v. Mercer*, 30 May 1833, 11 S. 665.

(b) *Cunninghame v. McLeod*, 13 Aug. 1846, 5 Bell, 210, affg. 3 D. 1288; *Martin's case*, *infra*, 185.

to, subject to the declaration that her interest is *alimentary*. The operation of such a provision, which seems to be analogous in its effects to the English clause against anticipation (a), has not been much considered by the writers on our own law. On principle, the declaration must be held to import a restriction on the wife's power of burdening or disposing of her interest either in possession or expectancy. It is well established, that where the subject conveyed to a beneficiary is a life-rent interest merely, the limitation of that interest to the beneficiary's use will be sustained to a reasonable extent, even in the case of a gratuitous disposition to a person *sui juris* (b), and much more in the case of a married lady. In one case, a life-rent alimentary annuity to a nephew of L.1500 per annum was held to be not unreasonable in amount, reference being had to the rank and circumstances of the annuitant (c); and a preference was accordingly given to alimentary creditors. And where a married woman assigned her alimentary estate in security of advances made to her husband, at her request, to enable him to retrieve his affairs, the House of Lords, in a reduction at her instance, declared the assignation invalid (d). There is no instance of an alimentary life-rent provision by a stranger to a married lady having been set aside or held restrictable as excessive. But alimentary conveyances by the husband in ante-nuptial contracts will only be sustained to the full extent when there has been a *bona fide* separation of the subject from his other property (e). "It is not disputed," said Lord Campbell (f), "that the law of Scotland recognises the settlement of property as an alimentary provision for a married woman, and that it may be made not assignable or subject to debt or diligence, according to the principles upon which many cases have been decided in England, which are all to be found cited in *Tullett v. Armstrong*."

To what extent
alimentary
titles are
effectual.

*Rennie v.
Ritchie.*

In order to secure an alimentary fund against alienation or attachment for debt, the intention must be unequivocally expressed,

(a) See Lewin, Tr., 4th Ed. 489.

(b) Stair, 3, 1, 37; Ersk. 3, 6, 7; Bell's Com. 528 (5th Ed. I. 128); *supra*, I. 110.

(c) *Earl of Buchan v. His Crs.*, 13 S. 1112; see *Stewart v. Hunter's Trs.*, 10 Mar. 1848, 10 D. 922.

(d) *Rennie v. Ritchie*, *infra*; *Paterson v. Paterson*, 26 Jan. 1849, 11 D. 441.

(e) See the cases of *Darling*, and *Campbell*, *supra*.

(f) *Rennie v. Ritchie*, 25 Apr. 1845, 4 Bell, 242.

Is the term
"alimentary"
essential?

as the presumption of law is adverse to restrictions on the rights of property (a). A declaration that the fund is to be considered alimentary is equivalent to an exclusion of creditors (b); but the use of that word is not essential. A declaration that the fund was for the support and maintenance of the beneficiary was found not to import such an exclusion of the diligence of creditors (c).

Mere exclu-
sion of *jus*
mariti does not
prevent aliena-
tion by the
Wife.

But while the decisions to which reference has been made establish the proposition, that a settlement to the wife's *alimentary* use will protect the estate against the diligence of her own as well as her husband's creditors, and will also exclude voluntary alienation on her part during the subsistence of the marriage, it would rather appear that the mere exclusion of the marital rights, even in a *liferent* conveyance, is no bar to voluntary alienation; for, the wife being absolute proprietor of the subject, may, by her own act, assign her interest in anticipation, thereby defeating the very object of the exclusionary clause (d).

Comparison
of doctrines of
English and
Scotch law
by Lord
Cottenham.

The distinction between the effect of the alimentary clause and that which excludes the marital rights, was very distinctly pointed out by Lord Cottenham in a passage in which the subject is illustrated by reference to the English law (e). "When first by the law of this country property was settled to the separate use

(a) *Gordon v. Blackburn*, 1697, M. 10394.

(b) *Harvey v. Calder*, 13 June 1840, 2 D. 1095; *West Nisbet v. Morrison*, 1627, M. 10368; *Urquhart v. Douglas*, 1738, M. 10403.

(c) Bell's Com. 529, Note c; but see *contra*, *Wright v. Harley*, 2 June 1847, 9 D. 1151.

(d) See *Rennie v. Ritchie*, 25 Apr. 1845, 4 Bell, 221, 242, 244.

(e) It appears that the English clause restraining anticipation was devised by Lord Thurlow, and introduced into a settlement of property of which he was trustee (see *Pybus v. Smith*, 3 Bro. C. C. 347; and Lord Cottenham's remarks in *Rennie v. Ritchie*). The condition is valid when annexed to a gift to a married woman for her separate use, whether the sub-

ject of the gift be real or personal estate, or whether it be in fee or for life only (*Baggett v. Meux*, 1 Coll. 138, 1 Ph. 627).

Property given to the wife's separate use, subject to restraint upon anticipation, may be alienated by her after the dissolution of the marriage (*Tullett v. Armstrong*, 1 Beav. 1, 4 My. & Cr. 377). It was settled, however, in the same case, that although the effect of the restraining clauses is suspended during the period of widowhood, these clauses become again operative in the event of the lady entering into another marriage. A trust for the wife's separate use may, however, be confined to a particular coverture (*Knight v. Knight*, 6 Sim. 121; *Benson v. Benson*, 6 Sim. 126; *Bradley v. Hughes*, 8 Sim. 149).

of the wife, equity considered the wife as a *feme sole* to the extent of having a dominion over the property. But then it was found that that, though useful and operative so far as securing to her a dominion over the property so devoted to her support, was open to this difficulty, that she being considered as a *feme sole*, was of course at liberty to dispose of it as a *feme sole* might have disposed of it, and that of course exposing her to the influence of her husband, was found to destroy the object of giving her a separate property. Therefore, to meet that, the provision was adopted of prohibiting the anticipation of the income of the property, so that she had no dominion over the property till the payment actually became due. That is the provision of the law as it now stands, and that is found perfectly sufficient for the purpose of securing the interests of married women. In Scotland much the same course is adopted, the same objects have been worked out, though not precisely in the same way; but still there is, by the law of Scotland, a protection in favour of an alimentary fund, and there is a provision that the alimentary fund shall not be assignable. These are two provisions very much corresponding with the provisions which have been adopted in the law of England" (a).

To complete the exposition of the subject of trusts of wife's separate estate, it is necessary to advert to two questions which have recently been the subject of judicial decision:—*First*, How far a *fee* can be subjected to alimentary restrictions; *secondly*, in the event of property being conveyed by a stranger to an unmarried woman, excluding the *jus mariti* of any husband she may marry, whether the husband is bound by such restriction in the absence of any special stipulation in the contract of marriage.

With reference to the first question, it is very doubtful whether an alimentary conveyance of a capital sum to a person *sui juris* can be supported on principle. It would rather seem that the restraint on alienation, which is of the essence of an alimentary provision, is so inconsistent with the nature of a *fee*, that the grantee could not be prevented from assigning it either onerously or gratuitously (b). If he can assign, it would be difficult to hold that his creditors may not also attach the property by diligence;

How far a *fee* can be made the subject of an alimentary destination.

(a) *Rennie v. Ritchie*, 4 Bell, 244–5.

(b) Bell's Com. 530, Note b (5th Ed. I. 130).

Effect of
subsequent
acquisition
of fee by
alimentary
liferenter.

since no one can be permitted to retain the power of voluntary alienation, and at the same time to secure his property against liability for his debts (a). Practically, an estate in fee belonging to a married woman may, as we have seen, be protected through the intervention of a trust; and we think that an alimentary conveyance to a married woman in fee would be supported, although the title was vested in her person. The authorities already cited do not distinguish between liferent and fee-simple alimentary interests.

Balderston v. Fulton.

The point was raised in *Balderston v. Fulton* (b), where there was a conveyance to trustees for payment of the annual income to the truster's widow, and after her decease to her daughter during her lifetime, exclusive of her husband's *jus mariti*; and the trustees were then directed to make over the trust estate to the testator's own nearest heirs after the death of the longest liver of himself, his wife and daughter. The daughter, having survived her parents, brought a declarator concluding that, as she was her father's nearest heir, she was entitled to have the capital paid over to herself and her husband in virtue of the ultimate destination. The First Division found that "there was vested in the pursuer a right to the fee or capital of the estate, heritable and moveable," which belonged to her father; but refused to decern for payment of the capital, on the ground, as explained by the Lord President, "that there was a settled purpose in the mind of the truster to secure the annual proceeds of this estate to his daughter during her lifetime, exclusive of the *jus mariti* of her husband" (c). A similar opinion was expressed by Lord Deas:—"The truster might choose to protect the liferent for the daughter's maintenance, and yet not to exclude either her or her husband from dealing with the fee, subject always to the condition, that the capital must remain intact in the hands of the trustees" (d).

Equitable
liferent, with
power to Trustees to make
advances.

This case is quite distinguishable from the previous decision in *Nisbet v. Tod* (e), where a liferent having been given to a lady, who was one of the next of kin, with power to the trustees to make advances to her out of the capital, the Court held, that as

(a) But see *contra*, *Urquhart v. Douglas*, 1738, M. 10403.

(b) *Balderston v. Fulton*, 23 Jan. 1857, 19 D. 293.

(c) 19 D. 801.

(d) 19 D. 300.

(e) *Nisbet v. Tod*, 15 Jan. 1848, 10 D. 361.

there was no appropriation of the capital, the liferenter was entitled to *immediate* payment of the share of the fee which had fallen to her as heir *ab intestato*. It is now settled that a capital sum secured to a wife by marriage-contract, "as an alimentary provision for the support" of herself or the survivor of the spouses, loses its alimentary character when the lady becomes a widow; because such restrictions, when occurring in marriage-contracts, are supposed to have been added for the protection of the wife's interest during marriage, and when that relation has been dissolved, the lady is as completely capable of managing her own fortune as if she had never been *vestita viro* (a).

The question, whether the husband is bound by an anticipatory exclusion of his marital rights, was argued before the Second Division in the case of *Young v. Loudoun*. The creditors of the husband had executed a poinding of the furniture in his dwelling-house, which was resisted by the wife on the ground that she had acquired the furniture before marriage under her aunt's settlement, which conveyed the house and furniture to herself "exclusive of the *jus mariti* and right of administration of any husband she may marry." For the creditors it was argued, that as the suspender's right to dispose of the effects *before marriage* was absolute, she might have conveyed it to her husband *per expressum* by marriage-contract. But such express conveyance was not necessary; for the legal assignation implied in marriage would of itself operate as a conveyance in his favour of every moveable subject of which she was entitled to dispose. The Court found that the legal assignation of marriage did not extend to property held by a title which excluded the operation of that assignation (b).

Whether
Husband
bound by anti-
cipatory exclu-
sion of marital
rights.

It will be seen by the following extract from Lord Cowan's opinion, that the view there taken of the nature of the wife's interest is very similar to that which was the foundation of Lord Cottenham's judgment (c) on the same question, in the leading English case of *Tullett v. Armstrong*:—"The condition in favour of the wife was inserted in a bequest to her made before marriage. This is a very common condition as to sums provided to unmarried

Principle
stated by Lord
Cowan.

(a) *Martin v. Bannatyne*, 8 Mar. 1861, 23 D. 705; see 709.

(b) *Young v. Loudoun*, 26 June 1855, 17 D. 998.

(c) *Supra*, p. 182, Note (c).

females, especially in provisions by fathers for their unmarried daughters. But if, as in this case, the lady's right is to be held assigned to her husband by the fact of her marrying without a contract of marriage, the condition attached to the bequest or provision must, in every such case, be rendered abortive. It is *jure mariti* that the wife's fortune becomes vested in the husband. The marriage does not carry her moveable estate to him when the *jus mariti* has been effectually excluded; and the question truly resolves into the inquiry, whether his legal rights over his estate have or have not been excluded *cum effectu*. For the legal assignation implied in marriage cannot carry any subject which stood well excluded from the operation of the *jus mariti*. That such exclusion may be declared by a third party when the bequest is to a married woman, is not disputed; but if this can be legally done at all without consent of the husband, there is neither principle nor authority for holding it illegal when the donee is still unmarried; and the donor being admitted to have had power to exclude the *jus mariti*, there is an end of the case stated by the creditors" (a).

Identification
of Wife's separate
estate.

It may happen, if the wife has full power over her separate estate, that changes are made in the investments during the subsistence of the marriage, which may create a difficulty, after the husband's death, in regard to the ascertainment of what was truly the estate of the wife. As to this point, the recent decision in *Cuthill v. Burns* (b) may be consulted. The Court allowed an investigation before an accountant, and being satisfied, upon his report, that two sums of L.6000 and L.300, deposited in bank in name of the spouses jointly and the longest liver, were the produce of the wife's separate estate, preferred her to those sums, although the result of sustaining her claim was to carry away the greater part of the husband's succession.

(a) 17 D., pp. 1001-2; see Lord Cottenham's opinion in *Tullett v. Armstrong*, 4 M. & C. 377.

(b) *Cuthill v. Burns*, 20 Mar. 1862, 24 D. 849.

CHAPTER XXXV.

OF MARRIAGE-CONTRACT PROVISIONS.

MARRIAGE-CONTRACT provisions may be distinguished according to the persons by whom or to whom the obligations are granted, according to the form and subject of the provision, and according to the legal character of the beneficiary's interest in it. For the purposes of our inquiry, it will be sufficient to consider, *first*, the different kinds of obligations that may be undertaken in antenuptial contracts of marriage; *secondly*, the different modes of securing the provisions which are the subject of marriage-contract obligations, so as to secure either a *jus crediti* available in bankruptcy, or a *preferential right* to the subject of the provision. The subject of the settlement of the lady's fortune has been considered in the last chapter.

Division of the subject.

SECTION I.

OF THE DIFFERENT FORMS OF MARRIAGE-CONTRACT PROVISIONS.

1. The simplest form of provision is that of a money obligation, either for payment of a fixed sum or a life annuity at the dissolution of the marriage, or at such other time as may be agreed upon. Money provisions to wives are usually, though not invariably, in the form of an annuity. The provisions to the children are usually vested in trustees; and the trustees have frequently the power of limiting the interests of the children to a life annuity should occasion require, and of settling the provisions of daughters to their separate use by marriage-contract. A power of division is always reserved to the father, sometimes to both parents, and the legal provisions are excluded.

Money obligation.

Form and destination of money provisions to children.

Provisions to sons are usually payable on their attaining majority, and after the death of the father; but sometimes at majority, without reference to the father's death; or at the dissolution of the marriage (a). Money provisions to daughters are either in the form of an obligation to pay a fixed sum—the period of payment in their case being majority or marriage, whichever shall first happen—or in the form of a sum to be *liferented* by the daughter, with a destination of the fee to her children, whom failing, to the surviving brothers and sisters and their issue. In point of fact, it is believed that the forms of destination which actually suggest themselves to the minds of the contracting parties are very few, and that the varieties of destination which one meets with in practice owe their origin to the ingenuity of the conveyancer rather than to the intention of the parties. Three principal forms of destination may be distinguished: (1.) Where the intention is to give children a vested interest in the capital upon majority or marriage, although the parent may be alive, and payment is postponed until his death; (2.) to give each child an interest, which only vests upon majority or marriage, and after the parent's death; and (3.) to give the children a life interest in the proceeds of the estate, and the fee to their respective heirs; the vesting of the fee of each share being in this case postponed until the expiration of the *liferent*.

Destination to Wife in *liferent* and children in fee.

On the other hand, where a *liferent* of the entire estate is given in the first instance to the wife, and the reversion of the fee to the children, we think that in most cases the intention of the settlor is to give each child a vested interest at majority in his share of the reversion capable of being assigned or disposed of by will. The presumption for vesting is stronger in the case of marriage-contract provisions than under testamentary settlements, because the provisions come in place of legal rights. However, as the ascertainment of the term of vesting is governed in a great measure by fixed rules of construction, depending upon the form of the destination, settlors ought to be careful, if any variation from the ordinary style is introduced into the settlement, to state explicitly whether the children are or are not to have the right of disposing of their

(a) As to the effect of an obligation to pay at the majority or marriage of the child, or at the dissolution of the parent's marriage, in conferring a *jus crediti*, see Section 2, *infra*.

shares by way of anticipation; and if so, at what period a vested interest in the estate shall be held to have been acquired.

In the case of annuities to wives, the presumption, in the absence of express stipulation, is, that the half-yearly payments are to be made in advance, the widow being entitled *ex lege* to interim aliment, with an allowance for mournings, for the period of her widowhood preceding the first term's payment of her annuity (a). There is no reason for interfering conventionally with the rule according to which widows' annuities are payable in advance; and unless a stipulation to the contrary were framed, in such direct terms as would be out of place in a contract of marriage, the Court would not give effect to it (b). It is very general in modern practice to name a fixed sum, payable to the widow in lieu of aliment and mournings. The Apportionment Act, 4 & 5 William IV. cap. 22, which regulates the interests of heir and executor in the succession to the termly payment current at the death of a *fiar* or *liferenter*, does not apply to annuities and *liferents* which, by the express words of the settlement, are made payable at fixed terms (c).

Annuities to Wives, when payable.

2. Money provisions by landed proprietors are usually, though not always, made chargeable upon or payable out of the rents of the estate. Although, practically, the beneficiaries have under this form of provision a much better security for the payment of their provisions than in the case of a simple obligation by a person whose capital is embarked in trade, yet in point of law their interest is the same. In both cases the free estate of the husband or father is liable in payment of the provisions; in neither case does the obligation confer a preference, unless the proprietor is divested of a portion of his estate so as to create a security for the obligation (d). A wife is always a creditor for her provision, while the children may only have a *spes successionis* in obligations.

Provisions charged on rents of heritable estate.

Money provisions to children, whether payable in the first instance out of the personal estate or out of land, may be made to vary

Conditions as to amount, etc., of money provisions.

(a) Ersk. 1, 6, 41, & 2, 9, 67; see *Palmer v. Sinclair*, 27 June 1811, F. C.; *Alexander v. Alexander*, 26 Feb. 1830, 8 S. 602; *Kermack v. Storie*, 1 July 1831, 9 S. 860.

(b) *Rennie v. Walker*, 1800, M. "Presumption," No. 4.

(c) *Thomson v. Douglas*, 15 July 1856, 18 D. 1240; *Trotter v. Cunningham*, 26 Nov. 1839, 2 D. 140; *Lockhart v. Lockhart*, 1 Feb. 1839, 1 D. 443.

(d) See Section 2, *infra*.

Influence of
the Law of
Entail.

in amount, according to circumstances. A frequent stipulation is, that a certain sum shall be payable if there is only one child; so much if there are two; and a certain larger sum for any greater number; subject, in the event of there being more than one child, to a power of division by the parents or the survivor. In the case of provisions to the younger children of landed proprietors, the failure of heirs-male may be taken into view as a ground for increasing the amount of the provisions to daughters. A provision granted to daughters, failing heirs-male of the marriage, is exigible though a son be born, if he predecease the father (a). As proprietors of unentailed estates, since the passing of the Entail Amendment Act, are no longer bound by substitutions in the titles of their estates carrying the succession to heirs-male, but may, on the contrary, settle the estate on the eldest daughter, failing male issue of the marriage, there is the less reason in their case for the introduction of fluctuating provisions into marriage-contracts. The amount of the provisions to widows and children chargeable by entailed proprietors upon their estates, is regulated either by the powers of the deed of entail, or by the statutes enlarging the powers of entailed proprietors (b).

Exclusion of
child in event
of succeeding
to other estate.

In settling provisions upon younger children, care must be taken to exclude the child who may succeed to the estate as eldest survivor, or otherwise, from the benefit of a share in the fund. In *Cruickshank's Trs. v. Cruickshank* (c), where the whole rents of an estate were appropriated as a fund of division for younger children, on the narrative that the eldest son was otherwise provided for, and the father obliged himself to secure a provision to the eldest son equal to that of his younger children, in the event of his being deprived of the inheritance of another estate, it was held, upon the occurrence of the event contemplated, that the heir had no right to a share of the heritable fund provided to the other children, but that his claim was against the surplus estate.

(a) Ersk. 3, 8, 38; Bell's Prin. § 1961; 1 Fraser, 823, and cases there cited.

(b) As the statutory and case law relative to the provisions that may be granted by entailed proprietors forms a main topic of discussion in the treatises on the law of entail, it is unnecessary that we should enter upon the

subject. The construction of marriage-contract provisions granted by entailed proprietors falls within the scope of our subject; but questions as to the power of the proprietor to provide, are not questions of trust, but of the law of property.

(c) *Cruickshank's Trs. v. Cruickshank*, 2 Nov. 1853, 16 D. 7.

Sometimes an heir apparent or expectant of heritable property undertakes an obligation in a contract of marriage conditional upon the event of his succeeding to the estate. It would seem, notwithstanding the 8th section of 11 & 12 Victoria, cap. 36, that such obligation does not create a *jus quæsitum* in the children so as to prevent the granter from consenting to a disentail (a). In one case, where a husband obliged himself by ante-nuptial contract to provide a certain sum to the younger children of the marriage, provided he should succeed either to the whole of certain estates, or to such part thereof as should be of the yearly value of L.3000, and he succeeded to the whole, the Court held that the provisions were due, and that it was irrelevant to allege that the yearly value of the whole estate was under L.3000 (b).

Obligation to provide for children out of future inheritance.

Obligations are frequently undertaken by the parents of the contracting parties to provide certain sums to the children of the contemplated marriage, which may be payable to such children immediately on the death of the grandparent, or may be burdened with a life interest in favour of one or both of the spouses. A father, in settling a fixed provision on his daughter, may undertake that, in the eventual distribution of his estate, she shall receive as large a portion as his other children. In a case where the wife's father bound himself to pay to her after his death a sum equal to "the portion or fortune" which any of his other daughters might have from him, and he afterwards, in the marriage-contract of another daughter, bound himself to pay her L.2000 at his death, with interest from the date of the marriage, it was held that the daughter first married was entitled to claim an equivalent for the whole sum received by her sister, inclusive of interest (c). In another case, the father of the husband bound himself to pay his

Obligation by parents of the contracting parties.

(a) *Pet. Maxwell*, 27 Feb. 1857, 19 D. 571. The section (11 & 12 Vict. c. 36, sec. 8) provides, that where the heir in possession or heir apparent shall "have secured, by obligation in any marriage-contract, the descent of such estate upon the issue of the marriage," it shall not be competent to disentail until the birth of a child who, by himself or guardian, shall consent, unless the trustees of the contract shall

consent to the application. In this case the Court held the consent of the father, and also of the trustees of the marriage-contract, sufficient to obviate any objection to the disentail on the score of the interest of the younger children.

(b) *Erskine v. Williams*, 14 Dec. 1843, 6 D. 226.

(c) *Macqueen v. Nasmyth*, 29 Jan. 1831, 9 S. 355.

son a portion of L.1000, and also "to put him on an equal footing" with the other younger children. He afterwards settled an annuity of L.200 a year upon his daughter, payable from the date of her marriage. It was found that the son was entitled to an equivalent for the annuity, and that the father's obligation was not discharged by leaving his son a share of the residuary estate equal to that of the other children (a).

*Earl of
Galloway v.
Stewart.*

Again, where a father undertook by the marriage-contract of his son to secure a money provision to the children of the marriage, provided that, if the son succeeded to a certain entailed estate, he should relieve him of the obligation by "well and effectually charging the estate," and the son eventually succeeded to the entailed estate, but not till after the provisions had been paid, it was held that the son's heir of entail was not entitled to charge the provisions upon the estate, on the footing that he, as his father's representative, was acting in fulfilment of the marriage-contract obligation (b). Where a wife's father undertook to provide her in a share of his father's succession, which had not yet opened to him, and eventually the succession was exhausted by the payment of debts and the widow's terce, it was held that a sum which the obligant ultimately received as the representative of his mother, including a portion of her terce, was not subject to the marriage-contract obligation (c).

Provision by
way of joint-
ure.

3. The most usual mode of making a provision for the widow of a landed proprietor, is by way of jointure, which is a fixed annuity payable out of the rents of the estate. The husband obliges himself to infest her in security. The annuity is considered to be chargeable with a proportion of the public burdens exigible from the estate (d).

Value of
estate, at what
period to be
estimated.

Where a jointure is fixed at a certain proportion of the rent, the value must be struck as at the death of the husband, and not at the time of the constitution of the annuity, as is the case with a provision by way of locality (e). Where the annuity is made pay-

(a) *Threshie v. Threshie's Trs.*, 8 Feb. 1845, 7 D. 408.

(b) *Earl of Galloway v. Stewart*, 28 Nov. 1861, 24 D. 93.

(c) *Spalding v. Small*, 13 Nov. 1821, 1 S. 123.

(d) *Erskine*, 2, 9, 61; *Bankton*, 1, 651 and 658; 1 *Fraser*, 799, and cases there cited.

(e) *Douglas v. Douglas*, 15 May 1822, 1 S. 446; *Roths v. Roths*, 29 Jan. 1829, 7 S. 399; *Macpherson v. Mac-*

able at the first term after the husband's death out of the rents of his estate, it seems to be doubtful whether the widow can claim from the husband's executors a proportion corresponding to the portion of the current term that had elapsed before his death. In one case, where the Court thought that the annuity was intended to run from the period of death, and not from the first term thereafter, a claim against the executor was sustained (*a*).

4. Provisions to wives by way of locality are not often met with, except in the settlements of entailed proprietors. As it is necessary, in virtue of the provisions of the Entail statute, that all exceptions to the prohibition against the contracting of debt should be definitively settled by the entail, it follows that the powers of heirs-substitute in the matter of providing for widows and children, are circumscribed by the original grant. In order that these might not become too restricted, in consequence of the tendency of landed property to rise in value, the powers of burdening conferred by entailers have usually been made to bear a certain proportion to the rental; being, in the case of provisions to children, fixed at so many years' rent; and in the case of widows, restricted either to a certain proportion of the free rental, or to the rental of a certain portion of the lands, called locality lands, in which the husband is at liberty to secure his wife by infestment (*b*). In estimating the value of provisions to wives and children, whether having relation to the rental or the lands, the rent of valuable shootings must be taken into account, whether they are actually let or not (*c*).

Provisions
by way of
locality.

The value of locality lands is taken as at the time of the constitution of the provision, and not as at the husband's death (*d*). But this principle seems to have been unsettled by the final decision of the Court in the case of *Menzies*, where the value of the shootings was directed to be estimated as at the death of Sir Neil Menzies, the

At what period
the value of the
lands is to be
estimated.

pherson, 24 May 1839, 1 D. 794; and see *Menzies v. Menzies*, 10 July 1855, 17 D. 1090.

(*a*) *Cruickshank v. Sandeman*, 16 Feb. 1843, 5 D. 643. See Chapter XXXVI. Section III. (Legacies).

(*b*) Bell's Com. (5th Ed.) I. 637; 1 Fraser, 801.

(*c*) *Menzies v. Menzies*, 10 Mar. 1852, 14 D. 651; see 10 July 1855,

17 D. 1090. See *Macpherson v. Macpherson*, 13 Aug. 1846, 5 Bell, 280; 24 Mar. 1839, 1 D. 794, locality cases. *Leith v. Leith*, 5 June 1862, as to children's provisions.

(*d*) Bell's Com., 5 Ed., I. 55; *Malcolm v. Malcolm*, 21 Nov. 1823, 2 S. 514; *Agnew v. Agnew*, 10 Dec. 1810, reported in a note to case of *Gordon*, 24 Jan. 1811, F. C.

granter of the locality (*a*). As in the case of a jointure, a liferentrix by way of locality is liable for a share of the public burdens, etc. (*b*); and she is also liable to defray, out of her part of the rents, the expense of necessary repairs (*c*), but not of improvements or extraordinary expenses (*d*). A liferentrix of locality is subject to the usual restrictions of liferenters by constitution in regard to the cutting of trees (*e*) and working of minerals (*f*); and of course she is not liable to the obligations, nor entitled to the privileges of a superior (*g*).

Provisions of
conquest.

5. Another form of marriage-contract provision, which however is now seldom resorted to, is that in which the husband settles the conquest of the marriage upon his widow and children in certain proportions, or by way of a destination in liferent and fee. "Conquest" represents the acquisitions of the husband during the marriage, exclusive of what he may acquire by succession (*h*), bequest (*i*), or donation (*k*). The ascertainment of conquest, therefore, involves an inquiry into the worth of the husband at the date of the marriage, unless the amount be conventionally fixed by specifying the extent of the deduction to be made from the free estate at the dissolution of the marriage (*l*). If it appear that the parties to the contract meant to attach a conventional meaning to the word "conquest," their definition, and not the legal meaning of the word, will constitute the law of their succession (*m*). As provisions of conquest are quite obsolete in practice—most of the cases, indeed, belonging to the seventeenth and early part of the

(*a*) *Menzies v. Menzies*, 10 July 1855, 17 D. 1090.

(*b*) *Ersk.* 2, 9, 61; 1 *Fraser*, 801, and cases there cited.

(*c*) *Ersk.* 2, 9, 60; *Scot v. Halyburton*, 27 June 1823, 2 S. 435; *Cunningham v. Cunningham*, 1733, M. 8275.

(*d*) *Anstruther v. Anstruther*, 14 May 1823, 2 S. 306; *Moreham v. Vineston*, 1679, M. 8499; *Stair*, 2, 6, 19.

(*e*) See *Ersk.* 2, 9, 58; *Dickson v. Dickson*, 24 Jan. 1823, 2 S. 152; *Macalister's Trs. v. Macalister*, 27 June 1851, 13 D. 1239.

(*f*) See *Douglas v. Douglas*, 15 May

1822, 1 S. 408; *Waddell v. Waddell*, 21 Jan. 1812, F. C.

(*g*) *Bell's Prin.* § 1055; *Henderson v. Mackenzie*, 19 Feb. 1836. See *Gibson-Craig v. Cochran*, 23 Sept. 1841, 2 Rob. 446, affg. 16 S. 1332.

(*h*) *Stair*, 3, 5, 22; *Ersk.* 3, 8, 43; *Bell's Prin.* § 1795.

(*i*) *Rae v. Rae*, 23 Jan. 1810, F. C.

(*k*) 1 *Fraser*, 757, citing *Mercer v. Mercer*, 1730, M. 3054; and *Kames' Elucid.*, Ed. 1777, p. 41.

(*l*) *Hunter's Trs. v. Campbell*, 25 May 1839, 1 D. 817.

(*m*) *Stair*, 3, 5, 52; and cases cited there, and in 1 *Fraser*, 757.

eighteenth centuries—it is unnecessary to occupy space with any further comment on their construction.

6. Again, a husband may provide his wife or children in certain specific moveable funds or property, or may bind himself to execute an assignation of such subjects in their favour. For example, a husband may, and frequently does, bind himself to insure his life for the benefit of his family, and to pay the premiums as they fall due, either directly to the insurance office, or to the trustees of the contract (*a*). A destination in a policy of assurance to the wife of the insured and her representatives, is a valid mode of creating a provision in her favour (*b*); though it is doubtful whether a provision can be created by taking a bank deposit receipt payable to the wife (*c*). If the husband should afterwards become unable from poverty to pay the premiums, he may, it would seem, upon application to the Court, receive authority to apply the money to the sustentation of the family (*d*).

Provision
of moveable
funds.

Another example of a provision of specific moveable subjects by marriage-contract, occurs in the destinations, so frequent in such deeds, of the household furniture to the wife, sometimes in liferent, and sometimes in fee, or with a right on the part of the children to redeem it at a certain price, and within a specified period. In the case of settlements of considerable landed estates, where the family residence goes to the heir and not to the widow, it is usually provided that the furniture is to go with the mansion-house, the heir being sometimes taken bound to pay a money equivalent to the widow or the personal representatives. It seems to have been considered at one time, that a liferent of the furniture in a mansion-house only entitled the liferenter to use it within the house, not to carry it elsewhere (*e*). Liferent of furniture is a somewhat anomalous description of right, as the subject is liable to deterioration; and we do not think that at the present day the Court would be disposed to control the liferenter's use of it, or to interfere, unless for the purpose of preventing an alienation (*f*).

Provision of
furniture.

(*a*) Bell's Com., 5th Ed., I. 639; 1 Fraser, 756.

(*b*) *Galloway v. Craig*, 17 July 1861, 23 D. Ap. Ca. 12, 22 D. 1211.

(*c*) *Cuthill v. Burns*, 20 Mar. 1862; 24 D. 849.

(*d*) *Gibb v. Pitcairn*, 8 June 1839, 1 D. 889.

(*e*) *Cochran v. Cochran*, 1755, M. 8280.

(*f*) See 1 Fraser, 759; 2 Bell's Illustrations 141.

Construction
of terms in
destinations
of *corpora*
mobilia.

We have elsewhere noticed the construction of terms occurring in bequests of household furniture, plate, pictures, and articles of domestic utility or ornament (*a*). The principles of construction, it is needless to say, are identical, whether the expressions occur in a legacy or a provision *inter vivos*.

Provisions
in favour of
the Husband.
Tocher.

With regard to provisions in favour of the husband, little need be said. Any money contributed by the wife or her parents on the occasion of her marriage, is either—(1) settled to her own use, exclusive of her husband's *jus mariti* and right of administration, with, or without an ulterior destination to the children of the marriage; or, (2) paid over to the husband absolutely; or (3) vested in trustees for the *liferent* alimentary use of the spouses and the survivor, fee to the children, restrictable to *liferent*, and subject to a power of division. As regards money paid over to the husband—tocher, *dos*—little need be said; for, when the money is paid, it becomes his absolute property, and no questions can arise regarding it. If not paid on the completion of the contract, he may have an action against the wife's father, or other relative by whom it was promised; but it would seem, on the authority of the older cases, that where the tocher comes directly from the wife, payment is presumed more easily than in the case of an ordinary debt (*b*).

Obligation
by Wife's
relatives.

Where, instead of an immediate payment, an obligation is undertaken by the wife's relatives to settle a certain share of succession upon the family, it seldom happens that the husband takes any interest under an arrangement of that nature. The obligation usually is to settle a certain sum upon the wife in *liferent*, and the children in fee. Some examples of this form of provision have been noticed at the commencement of the chapter. The cases on the law of vesting afford numerous examples of such provisions (*c*).

Rights of the
Husband and
his Creditors
in the tocher.

The conveyance by the wife to the husband of a fund in name of tocher, in an ante-nuptial contract, gives him a vested right in

(*a*) See Chapter XXXVI. Section II. (Legacies); and also *supra*, I. 135.

(*b*) See the cases collected in 1 Fraser, 780, where the reader will also find a summary of the older decisions upon a variety of points in the law as to tocher, which are now of little im-

portance, as it is now the universal practice to make the disposal of the wife's fortune the subject of express stipulation in the contract.

(*c*) Chapter XLIV., Law, of Post-poned Vesting.

possession, which transmits to his representative, and may be attached by his creditors. After the husband's death, the wife cannot, in a question with his creditors, plead retention, on the ground that the provisions in her favour have not been implemented (a). Mr Fraser is of opinion, that if payment were demanded by the husband himself, he would not be entitled to it without at the same time tendering such security for the wife's provisions as he might by the contract have agreed to give (b); and this seems reasonable.

SECTION II.

HOW PROVISIONS BY ANTE-NUPTIAL CONTRACT MAY BE SECURED.

The rules on this subject admit of being stated in very brief compass. The application of these rules to the construction of the different kinds of provisions which have been described in the preceding section, has given rise to questions not unattended with difficulty.

The leading principle is, that a simple unilateral obligation in a marriage-contract in favour of one of the parties is onerous, the marriage being regarded as a counter prestation. The wife has therefore a *jus crediti*, entitling her to rank with other creditors for the value of her provisions (c). Provisions to children, on the other hand, are only onerous in the event of their being made payable at a period which may arrive before the death of the father, by whom they are promised; as, for example, at the dissolution of the marriage; or at the majority or marriage of the child (d), or by being made to bear interest from such a period (e).

Obligation in favour of the contracting parties is onerous.

Obligation in favour of children not onerous, unless prestable before the dissolution of the marriage.

(a) *Boswell v. Miller*, 4 Feb. 1846, 8 D. 430; *Greenhill v. Aitken*, 24 June 1824, 3 S. 169; *Woollen Manufactory of Haddington v. Gray*, 1761, M. 9144.

(b) 1 *Fraser*, 781.

(c) Accordingly, in the event of the husband's bankruptcy, the wife may rank for the provisions, as for a con-

tingent claim, under the Bankruptcy Act.

(d) *Adv.-Gen. v. Trotter*, 14 Jan. 1847, Exch. Rep.; *Cruikshank's Trs. v. Cruikshank*, 2 Nov. 1853, 16 D. 7; *Jolly v. Graham*, 24 Feb. 1824, 2 S. 730.

(e) *Mackenzie's Crs. v. His Children*, 1792, M. 12924. Compare these cases

Whether a marriage-contract provision can ever be regarded as testamentary.

It is needless to inquire into the reason of the distinction. It probably originated in the notion, that provisions to children payable after death were of a testamentary character. That reason, at all events, is no longer valid; for it has been solemnly decided by the Court of Exchequer, in a case where a sum of money was provided by the husband in his ante-nuptial contract, payable to the children of the marriage at the first term of Whitsunday or Martinmas after the husband's death, and which was declared to be in full of legitim and *executry*, that a provision of this nature was not testamentary, and therefore not liable to legacy duty (*a*). Lord Fullerton, however, observed, that even in marriage-contracts there might be provisions of such a clearly testamentary character as to bring the deed within the category of a testamentary instrument; and he instanced the case of a settlement by marriage-contract of all the estate belonging to the parties at their death (*b*).

Rule as to children's *jus crediti* stated by Lord Moncreiff.

The rules according to which the right of the children is determined to be either a *jus crediti* or a *spes successionis*, are succinctly explained in the following passage from Lord Moncreiff's opinion in a leading case (*c*):—

“1. I understand the rule of law to be, that under such marriage-contracts the children have a *jus crediti*, giving them such a right against the creditors of their father, if the provision is so conceived as that there was or might be a direct interest accruing to them in the lifetime of the father. As, for example, if the provision is made payable on the marriage or majority of the child, though such event should happen in the lifetime of the father; or if the provision is declared to bear interest from any such term which might be in his lifetime; or if it is declared to be payable at the dissolution of the marriage, or to bear interest from and after that event, which may happen by the wife's predecease.

with *Mactavish*, 1787, M. 12922; and *Brown v. Govan*, 1 Feb. 1820, F. C., where the provisions, not being payable at a time certain, were held not to confer a *jus crediti*.

(*a*) *Adv.-Gen. v. Trotter*, 14 Jan. 1847, Exch. Rep.

(*b*) See p. 34 of the separate report. See also *Somerville v. Somerville*, 18 May 1819, F. C., where a delivered

deed was presumed to be ambulatory and revocable, because it conveyed the *universitas* of the grantor's estate.

(*c*) *Goddard v. Stewart's Children*, 9 Mar. 1844, 6 D. 1018. See the doctrine explained also in the leading opinion in *Herries, Farquhar, & Co. v. Brown*, 9 Mar. 1838, 16 S. 964; and in Bell's Com., 5th Ed., I. 640.

"2. But, on the other hand, if the provision is so conceived that the principal is not payable till after the father's death, and does not bear interest from any earlier term, and where no actual benefit or interest can be claimed or taken in his lifetime, there is no *jus crediti* vested in the children as against onerous creditors. In respect of the father and his heirs, they are no doubt creditors; but in respect of his creditors, they are merely heirs, having no more than a *spes successionis*.

"3. I understand it also to be a fixed rule, that it has no effect in conferring a *jus crediti* on the children, that, instead of the husband being simply bound to pay a sum to the children, he engages to provide and secure a sum so payable.

"4. But if he actually lends out the money, or constitutes a trust, or grants heritable security to the wife or any other person in name of the children, with absolute warrandice, it constitutes a fee in the children, which will prevail against onerous creditors" (a).

It may further be observed, that ambiguous expressions, pointing to a period of distribution other than the death of the father, will not control the express terms of the destination in a question as to the quality of the right conferred. For example, in the case from which the foregoing rules have been extracted, the father, after obliging himself to content, pay and secure to the issue of the marriage, *existing at the dissolution thereof*, a certain sum, declared that the children's provisions should be payable in equal instalments at twelve and twenty-four months *after his decease*. It was held that the children had no *jus crediti* (b).

Term of payment fixed by the words of the destination.

Such being the nature of the personal obligations which a husband may undertake for the benefit of his wife or children, it is a question of conveyancing rather than of trust law—by what kind of deed or conveyance real security may be given for the fulfilment of the obligation. By real security, we mean (though the expression is perhaps not strictly accurate) the security afforded by a preferential right to property, whether heritable or moveable in its nature. The answer is, that such security may be given by

Provisions may be secured by a conveyance of specific subjects either to the Beneficiaries or to Trustees.

(a) 6 D. 1023.

(b) *Goddard v. Stewart's Children*, *ut supra*. See *Browning v. Browning's Trs.*, 25 May 1837, 15 S. 999, where the destination was similar, and the

Court held that no *jus crediti* was conferred, but that the children were entitled to challenge any gratuitous deed of the father executed to their prejudice.

Provisions to
Wife.

a completed conveyance, either to the beneficiaries under the contract, or to trustees for their behoof. Thus, provisions in favour of a wife may be secured by infesting her in lands for her own use, exclusive of the husband's rights, or by assigning personal bonds, policies of assurance, stock, or other moveable rights, to her, under the same form of destination, and duly intimating the assignation (a). The same result may be attained indirectly by a conveyance to trustees for the wife's behoof. On the other hand, it has been decided (and the exception illustrates the principle of the rule which we have enunciated) that a husband cannot give his wife a preference over furniture or corporeal moveables which he retains in his possession (b). The reason is obvious. In the cases of heritable property and *jura incorporalia*, legal possession is given to the wife in the one instance by registration; in the other, by intimation; and those who have the means of knowing anything about the title to such property, are at the same time notified of the wife's separate interest in it. But it is impossible to separate the possession of the wife from that of the husband in the case of corporeal moveables; and accordingly, if it were intended to create a security over such property in fulfilment of a marriage-contract obligation, it would be necessary not only to vest the title to the property in trustees, but to place the property itself in neutral custody.

Provisions to
children.

Provisions to children may in like manner be secured, so as to give a preference over the diligence of creditors, by means of a conveyance of heritable or moveable property to trustees for their behoof, or to one of the parents for life or use only, and as fiduciary for the children of the marriage.

Preference
may be con-
ferred by con-
veyance after
marriage.

It is carefully to be observed that the *onerosity* of the provision arises upon the obligation in the marriage-contract; and therefore, although the contract be silent on the subject of *security*, yet if the husband afterwards settle property upon his wife or children, in one or other of the modes we have mentioned, in implement of his obligations, the security will be as valid and effectual as if it had

(a) And it would appear, that in the event of a variance between the destination in the marriage-contract and that in the security, the former

must prevail (*Ross v. Masson*, 3 Feb. 1843, 5 D. 483).

(b) *Campbell v. Stewart*, 13 June 1848, 10 D. 1280; *Brown v. Fleming*, 19 Dec. 1850, 13 D. 373.

formed a part of the contract. And after security has been given for a marriage-contract provision, it is of little consequence whether the obligation were or were not of such a nature as to confer a *jus crediti* on the children. We mean, it is immaterial, in considering whether a preference has been effectually secured, to inquire whether the provisions were payable at a time which might happen before the death of the father; for the nature of the security transaction is, that the father divests himself of his property in favour of his children, whose right, therefore, is no longer limited to a personal claim against the father's estate, but is of a similar nature to that of any other creditor holding a real security. The father may, according to the nature of the transaction, retain the liferent of his estate, or he may retain the radical right to the fee, subject to the children's security; but to the extent to which the children are secured, the property is theirs.

This was one of the points decided in the *Clanranald* case (a), where the husband, by his ante-nuptial contract, bound himself to pay a certain sum to the children of the marriage, payable six months after his death, subject to a reserved power of division, and granted warrant for infesting the trustees of the settlement in security; and the trustees took infestment. The estates were disposed to the granter himself and a certain order of heirs, subject to the younger children's provisions. In these circumstances, it was held by the whole Court, in an action raised by subsequent creditors of the husband, that the trustees for the younger children were, "in their character as trustees infest in security, entitled to compete with the diligence of the pursuers, and to rank in their proper order, according to their right of preference conferred by their said security" (b).

Herries, Farquhar, & Co. v. Brown.

In what has been said respecting the onerosity of marriage-contract provisions, whether resting in *obligatione* or fortified by security, it has been assumed that the father, at the time of granting the provision, was solvent. With respect to provisions to wives, there is authority for holding, that even although the husband were insolvent at the marriage, the provision, if in *obligatione*, might be sustained to the extent of what the Court would consider a

How far insolvency at the time of granting affects Wife's provision.

(a) *Herries, Farquhar, & Co. v. Brown*, 9 Mar. 1838, 16 S. 948.

(b) 16 S. 982.

reasonable and moderate provision in the circumstances (a). In judging of the reasonableness of the provision, the wife's situation and fortune before marriage are to be taken into consideration (b). If she have obtained security for her provisions, the question of solvency is immaterial, because she is entitled in a competition with creditors to the full benefit of her preference (c).

Provisions to children may be cut down by proof of insolvency.

Children do not appear to have any right to their provisions, even when these are made payable before the father's death, if he were insolvent at the time of granting the obligation in their favour, unless their right has been secured by a conveyance to trustees. If it has been so secured, they will be entitled to the benefit of the security. Thus, where a wife, by post-nuptial deed of settlement, conveyed her share of her father's succession to trustees upon trust for the spouses in liferent, and the children of the marriage in fee, and the spouses, having become the sole surviving trustees, assigned their right to another party upon trust, to recover the succession in question from the trustees of the wife's father, and to invest it in terms of the post-nuptial settlement, and the assignation was duly intimated before the husband was declared bankrupt, it was held that the assignation gave the children a preference over the husband's arresting creditors (d). In a later case, the Court, under very similar circumstances, sustained the children's preferential right to the fee, but found that the liferent, which had been settled to the use of the husband, was subject to the diligence of his creditors, and fell under his sequestration (e).

Obligation to secure provisions is fulfilled by investing the amount.

Where the husband is bound by the terms of the contract, as he very frequently is, not only to pay the provisions, but also to secure them at the sight of trustees for execution, his obligation is fulfilled by investing the amount on security of the description required by the settlement. If the obligation is simply to secure the provision, without mentioning any particular description of

(a) Bell's Com., 5th Ed., I. 637; 1 Fraser, 761; *Duncan v. Sloss*, 1785, M. 987; *Erskine v. Carnegie*, 1679, M. 968; *Gartshore v. Brand*, 1683, M. 987, 2 Br. Sup. 43.

(b) Bell's Com. and Fraser, *supra*; *M'Lachlan v. Campbell*, 29 June 1824, 13 S. 192.

(c) See *Burden v. Smith*, Elchies, "Mutual Contract," No. 7; affd. 1738, 1 Cr. St. & P. 214; and cases of *Morrice and Wood*, *infra*.

(d) *Morrice v. Sprot*, 27 June 1846, 8 D. 918.

(e) *Wood v. Begbie*, 7 June 1850, 12 D. 963.

security, his duty is the same as that of a trustee, and will be performed by investing a sum of money on heritable security (a). With regard to provisions by way of insurance on the husband's life, it would appear that the obligation to pay the premium is of a similar nature to a personal security. On this subject, Professor Bell observed, that "if a policy were opened *in name of the wife and children*, and the premium paid under such ante-nuptial contract, the benefit of that insurance would not seem to be demandable as part of the husband's estate, while a claim would seem to lie for the future premiums" (b).

A father, notwithstanding the destination of his estate to the heir of the marriage by ante-nuptial contract, has been held entitled to grant rational provisions to his wife and younger children, or to increase inadequate provisions if there were no other funds available to him for the purpose (c). And on the same principle, it is conceived that a father, whose whole available means has been settled upon the wife and children of a first marriage, may encroach upon their interest to the extent of making a moderate provision for the wife and children of a second marriage (d). It has even been held, that if a husband had improvidently settled his estates on the children of the second marriage only, he might burden the heir of the second marriage with rational provisions in favour of the children of the first (e). In the last of the older series of cases, a provision to a younger son's wife, as a jointure, was sustained, although the estate had been destined to the heir (f). Supplementary provisions must not be so great as substantially to destroy the right of the heir to the property disposed to him, but must bear such proportion to the entire estate as would be sanctioned by the usual practice of proprietors in burdening their estates for the benefit of younger members of the family. In

Implied reservation of power to burden estate with provision to Wife and younger children.

(a) *Lindsay v. Lothian*, 1685, M. 2269; *Hay v. Hay*, 1710, M. 12982; *Kirkland v. Her Son*, 1635, M. 2270; see Chapter XVI. Section 4.

(b) Bell's Com., 5th Ed., I. 639.

(c) *Miller v. Miller*, 30 July 1822, 1 S. Ap. Ca. 308; *Ewing v. Ewing*, 1799, M. 12997; *Ouchterlony v. Ouchterlony*, 1752, M. 13013.

(d) See Ersk. 3, 8, 42; *Cunning-*

ham v. Hawthorn, 20 Dec. 1810, F.O.; 1 Fraser, 794, and cases there cited.

(e) See *Bannerman v. Bannerman*, 15 Dec. 1801, Hume, 130; and cases in Fraser, *supra*; *Dykes v. Dykes*, *infra*.

(f) *Dykes v. Dykes*, 9 Feb. 1811, F. C. See Kilkerran, p. 465, on the question, what is to be considered a rational provision.

deciding the leading case of *Dykes v. Dykes*, it was laid down by Lord President Blair, with the approbation of the Court, that a provision to younger children out of the heir's inheritance must be imposed in the form of a burden on the succession, and not as a specific part of the estate. The reason appears to be, that a conveyance of the land, although not greater in value than a reasonable pecuniary provision, is a direct displacement of the heir's vested right, which, in the other case, is affected in a manner less injurious to his interests as proprietor.

Implied power
to provide
for Wife and
children of
second mar-
riage.

The later cases upon provisions to children of a second marriage, tend to throw some doubt upon the powers of the father to alter a destination created by prior onerous contract. In the case of *Bell's Trs. v. Cowan (a)*, a father had settled his entire estate upon the surviving spouse of the first marriage in liferent, and the children in fee. By a *post-nuptial* contract he settled an heritable provision upon his second wife, being part of the estate already secured to the children of the prior marriage. The First Division were equally divided in opinion on the question, whether the annuity to the second wife could be sustained to the extent of a reasonable provision. Minutes of debate were ordered with the view of laying the case before the whole Court, but the action was compromised. It has since been settled by a majority of the whole Court, that, under an ante-nuptial provision of a fund to the widow of a second marriage in liferent, and the children in fee, the widow was entitled to rank as an onerous creditor on her deceased husband's estate; but that the children had no *jus crediti* in a question with the children of the first marriage claiming *legitim*, as the provision in their favour was not made payable at a period which might have arrived before the death of their father (b).

In the case of *Harvey v. Wink (c)*, the question was raised under circumstances unfavourable to the claim of the beneficiaries under the second contract, as the question here was with creditors, and the provisions were not payable until the father's death. Here clearly the children had no *jus crediti*; and the averment, that the

(a) *Bell's Trs. v. Cowan*, 21 Nov. 1846, 9 D. 124.

(b) *Wilson's Trs. v. Pagan*, 2 July 1856, 18 D. 1097. See also *Bell's Com.* (5th Ed.) I. 642; *Campbell's*

case, there referred to; and English authorities stated *supra*, I. 515.

(c) *Harvey v. Wink*, 3 July 1847, 9 D. 1420.

father was their debtor for their mother's share of the goods in communion, was held insufficient to give an onerous complexion to the disposition in their favour (a).

SECTION III.

POST-NUPTIAL PROVISIONS.

With regard to the manner in which post-nuptial provisions may be constituted, it is sufficient to refer to the previous section, in which the various forms of ante-nuptial provisions have been considered. The points of difference between the two classes of provisions relate to the onerosity rather than to the substance of the provisions.

Distinguished from ante-nuptial provisions only as to the question of onerosity.

1. In entering into a post-nuptial contract, the wife does not appear in the character of an independent contracting party; she is therefore in a less favourable position to compete with creditors, than if her claim were upon an ante-nuptial contract. On another principle, however, the law supports a rational post-nuptial provision to the wife, to the effect of giving her a *jus crediti* in bankruptcy; that principle being, that as the husband is bound to make a reasonable provision for his wife at the time of the marriage, his subsequent settlement in fulfilment of that obediential obligation is binding upon his fortunes and his estate (b). It is implied in the statement of this proposition that the provision must be rational; that is, suitable to the circumstances of the husband; for, if otherwise, it is not a provision in fulfilment of the obligation referred to. It is also implied that the husband is considered to have been solvent at the time of granting the provision; for, unless he were so,

Rational post-nuptial provisions to Wives are effectual against Creditors.

(a) In *Cumming v. Cumming*, 16 July 1858, 20 D. 1280, it does not appear that any question was raised as to the right of the children of the first marriage to a preference. The father, a proprietor of an entailed estate, had burdened the estate with provisions to an extent exceeding what was permitted by the powers of the entail; and the competition was

between the younger children and the heir.

(b) *Stair*, 1, 9, 15; *Ersk.* 4, 1, 33; *Bell's Com.*, 5th Ed., 642; *M'Gregor's Trs. v. M'Gregor*, 22 Jan. 1820, F.C.; *Jeffrey v. Campbell*, 24 May 1825, 4 S. 32; *Sharp v. Christie*, 19 Jan. 1839, 1 D. 396; and see *Montgomery v. Hart*, 17 July 1845, 7 D. 1081.

there is no free estate to be bound. It has been observed by Mr Fraser (*a*), that the time for estimating the rationality of the provision is the time when it comes into operation, that is, when it may be demanded. There is some authority for holding that a post-nuptial provision to a wife granted after insolvency, may be supported, to the effect of providing the wife with a bare subsistence or aliment (*b*); but in more recent cases this theory has been dis-
countenanced, and it can no longer be regarded as positive and settled law (*c*). It will of course be understood that a rational post-nuptial provision to a wife is binding upon the husband personally, and upon his representatives, as well as upon those who administer his estate for the benefit of creditors.

Post-nuptial provisions to children are gratuitous and revocable.

2. There does not seem to be any material distinction betwixt an ante-nuptial and a post-nuptial provision to children, in regard to the kind of security it affords to them, in a question with creditors. In either case a *jus crediti* may be inferred, in respect of rational provisions payable at a period which may happen during the father's lifetime (*d*); while provisions payable after his death out of the free estate, unless secured by infetment, are postponed to the claims of onerous creditors (*e*). The right of the children as against the father depends, however, upon different considerations. Onerosity is implied in the case of an ante-nuptial provision, and the right of the children is irrevocable: But provisions to children subsequent to marriage are gratuitous, and may be revoked, unless actual or constructive delivery of the deed have taken place (*f*). Accordingly, it was observed in the case of *Thornhill v. M'Pherson* (*g*), that if the contracting spouses agreed to put the post-nuptial contract into the fire, they might thereby revoke its provisions, and entirely bar the claims of the children.

(*a*) 1 Fraser, 829.

(*b*) Ersk. 4, 1, 33; 1 Fraser, 829, and cases there referred to. *Supra*, p. 201, as to ante-nuptial provisions.

(*c*) See *Sharp v. Christie*, *ut supra*; *M'Lachlan v. Campbell*, 13 Feb. 1823, 2 S. 217, and 29 June 1824, 3 S. 192. See Bell's Com., 5th Ed., I. 642.

(*d*) See *Jeffrey v. Campbell*, 24 May

1825, 4 S. 32, and cases mentioned in 1 Fraser, 830.

(*e*) *Herries, Farquhar, & Co. v. Brown*, 9 Mar. 1838, 16 S. 948; *Poole v. Anderson*, 22 Feb. 1834, 12 S. 481; *Macgregor v. Macdonald*, 9 Mar. 1843, 5 D. 889.

(*f*) See Chap. IV., *supra*, Vol. I. p. 65.

(*g*) *Thornhill v. M'Pherson*, 20 Jan. 1841, 3 D. 394.

It has been generally considered that provisions to children bearing to proceed from both the spouses, could not be revoked by the husband alone during his wife's lifetime (a); and it would certainly appear from decisions pronounced anterior to the date of the Succession Act, that the death of either of the spouses gave the children an indefeasible right (b). Under the existing law, there can be no doubt that, upon the death of the father, the children become entitled to claim the value of their provisions from his succession; and under the old law it might have been urged that the death of the wife gave the children a similar claim upon her share of the goods in communion. Now, however, that the wife's right has been extinguished by the Moveable Succession Act, it deserves to be considered, whether children can be held to have acquired an indefeasible interest in provisions secured by post-nuptial contract, by reason of the death of their mother.

Whether
post-nuptial
provisions are
revocable
by the father
alone.

We refer to a previous chapter on Powers of Appointment on the subject of the constitution and effect of Post-nuptial Provisions granted in pursuance of reserved powers (c).

(a) See *Blair v. Hamilton*, 1714, M. 4 S. 749; *Anderson v. Garroway*, 27 Jan. 1837, 15 S. 485.

(b) *Wood v. Fairley*, 3 Dec. 1823, 2 S. 549; *Gentle v. Aitken*, 23 June 1826,

(c) Chap. XXII. Sects. 2 and 3.

CHAPTER XXXVI.

OF LEGACIES.

Limits and
classification
of the subject.

THE variety of forms in which a bequest may be given, and the variety of interests that may be created by bequests, might seem to necessitate a somewhat complex classification of this part of our subject. But, as many of the points that would fall to be separately considered in a treatise upon Legacies have been already dealt with in other parts of the volume, it is unnecessary for our purpose to follow any very orderly method of arrangement in the exposition of what remains to be said upon legacies, viewed as a special branch of the Law of Trusts.

In the present chapter we shall consider, in the *first* place, some incidental points connected with the constitution of legacies; *secondly*, the different descriptions of legacies, and the properties of the interests thereby created; *thirdly*, the extent of the legatee's right, including his right to interest and accessions, the burdens that may be devolved upon him, and questions of conflicting interests; *fourthly*, conditions in legacies. The important subjects of ademption and satisfaction, as well as the doctrine of joint and residuary interests, remain for consideration in the ensuing chapters.

SECTION I.

CONSTITUTION OF LEGACIES.

Questions to be
considered
relate to
(1) the testa-
tor, (2) the
form of the
bequest, (3) the
legatee.

Without attempting any very minute examination of the questions that may be held to fall within the scope of this section, we shall direct the attention of the reader to some questions of practical importance in the following order:—1st, Questions as to the testator

(mutual settlements, capacity to test, etc.); 2dly, questions as to the form of the bequest (nuncupative or in writing, testamentary or donative); and, 3dly, questions as to the legatee (words of destination—*designatio personarum*, legacy to indefinite class).

I. Questions relating to the Testator.

With regard to the source from which legacies are derived, and the capacity of the testator, we have little to add to what has been said under Chapters IV. and V., where the same points are treated in relation to trusts generally. From those chapters it will be seen that the law of legacies, while affording many illustrations of the general rules applicable to the constitution and authentication of deeds of importance, is also in some respects exceptional. It is unnecessary to repeat what has already been advanced regarding the effect of alterations upon holograph bequests (*a*) and the adoption of informal writings, whether prior or subsequent in date to the adopting instrument (*b*).

Capacity of Testator, and power of revocation and alteration.

We ought perhaps to notice in this place, that the power of testing upon their shares of the goods in communion, which was enjoyed by married women under the common law of Scotland—and which was indeed the only legal interest the wife had in the common fund—was taken away by the Moveable Succession Act, 18 Vict. cap. 23, § 6. This enactment does not, of course, affect the wife's power of disposal over property held by her exclusive of her husband's *jus mariti* and right of administration, or held by trustees for her separate use.

Abolition of Wife's power of testing on share of goods in communion.

There is just one other point relating to the constitution of legacies as to which it may be convenient to make a few observations. We refer to the effect of a legacy of common property bequeathed under a mutual settlement. The element of reciprocity, upon which the construction of mutual deeds must be based, has been usually considered sufficient to impart an obligatory character to all the provisions of such settlements; so much so, that in the case of a mutual entail, not only is the destination irrevocably fixed—it is even effectual after infertment has passed upon it to protect the estate against the diligence of subsequent creditors (*c*).

Power of revocation of settlement of common property.

(*a*) See Chap. IV. Sect. 1, and particularly pp. 42–45 and 48–53.

(*b*) Chap. IV. Sect. 2.

(*c*) *Vans Agnew v. Stewart*, 31 July

*Wilson's Trs.
v. Stirling.*

It is, however, quite competent to the parties, granters of a mutual settlement, to reserve to themselves a power of revocation either absolutely or *sub modo* (a). The point to which we wish to call attention relates to the construction of a reserved power to revoke to the extent of the respective shares of the settlors. Upon the construction of a power of revocation in that form it was held, in the case of *Wilson's Trustees v. Stirling* (b), that a general revocation of the settlement by one of the parties implied a revocation of every individual bequest to the extent of that party's *pro indiviso* interest in the joint property; and not simply a withdrawal of one-half the estate from the operation of the settlement. The effect of the distinction is important. If the latter construction had been adopted, all legacies of quantity must have been paid in full, notwithstanding the revocation, before the residuary legatees could have been let in. In the construction which has been adopted, and which seems to be more in accordance with the probable intention, all the legacies, general and residuary, suffer a rateable abatement to the extent of a half.

II. *Form of the Bequest.*

Legacy proper may be by direct gift or disposition; or by precatory or optative bequest.

A legacy may be declared either in a testamentary writing, or in a delivered assignation intended to take effect after death (called *donatio mortis causa*), or verbally to the extent of L.8, 6s. 8d.

A testamentary legacy is usually expressed in the form of a request or direction to the trustees or executors of the will to pay or make over the subject of the legacy to the legatee. When constituted by separate writing or codicil, legacies are frequently expressed in words of direct bequest. They may also be given by disposition; the *de presenti* mode of conveyance being, by the law of Scotland, a universal form of transmission. A legacy, moreover, may be constituted in the form of an optative bequest; for such is the favour shown to last wills, that the mere expression of the tes-

1822, 1 S. Ap. Ca. 320. See the cases upon Mutual Testamentary Settlements, *supra*, pp. 42 and 70.

(a) *Nimmo's Trs. v. Hogg's Trs.*, 24 June 1840, 2 D. 458.

(b) *Wilson's Trs. v. Stirling*, 13 Dec. 1861, 24 D. 163. *Quare*, can this case be reconciled with the prin-

ciple of the decision in *Bisset v. Walker*, 1799, M. "Death-bed," No. 2, where a mutual destination of heritage was held to subsist, notwithstanding the implied cancellation of the grant resulting from the fact that the deed, *quoad* one of the parties, was executed on death-bed?

tator's desire, without the nomination of an executor or trustee, and without even the form of a disposition or grant to any person whatever, is sufficient to operate a transference of the subject of bequest to the uses of the will (*a*).

Next, a legacy may be constituted by a delivered assignation of an incorporeal right, or by specific delivery of corporeal moveables, with the intention that the gift shall only take effect upon the death of the donor. This form of bequest received in the civil law the distinctive appellation of *donatio mortis causa* (*b*); and it has generally been admitted into modern systems of jurisprudence (*c*). Notwithstanding the doubts that have recently been expressed regarding the efficacy of this form of bequest (*d*), it is certain that such donations have been repeatedly recognised—whether under their proper distinctive appellation or not, is immaterial—by decisions of the Court of Session (*e*). For example, in *Fyfe v. Kedslie* (*f*), a donation of bank stock to the truster's nephews, qualified by a back letter, in which they promised to pay him the interest, and

Donatio mortis causa.

Whether recognised in the jurisprudence of Scotland.

(*a*) This proposition was established in the largest sense by the decision in the House of Lords in the *Mags. of Dundee v. Morris*, 1 May 1858, 3 Macq. 134. See the whole subject treated in Chap. VIII., *supra*, p. 149 (Implied Trusts).

(*b*) See Inst. lib. 2, tit. 7, where it is in substance stated that a gift made upon condition that if the donor dies, the donee shall possess it absolutely, is effectual in the same manner as a legacy: "Mortis donatio est, cum magis se quis velit habere, quam eum, cui donatur, magisque eum, cui donat, quam heredem suum," § 1.

(*c*) In the law of England, donations *mortis causa* are constituted by delivery, subject to the following rules, namely: (1) That the gift must be in contemplation of death; (2) that it is given under the implied condition that it is to take effect only in the event of the death of the donor; and (3) that there is tradition of the subject to the donee for his own use. The decisions are very numerous; and as donation does not fall within our

subject, it is unnecessary to do more than allude to them (see 1 Wh. & T. L. Ca. 721).

(*d*) See Lord Ivory's opinion in *Miller v. Milne's Trs.*, 3 Feb. 1859, 21 D. 377, 393.

(*e*) Such donations are referred to by Lord Stair (3, 2, 12). Erskine says (3, 3, 91), "The *donatio mortis causa* of the Romans, where the subject was given to the donee under the tacit condition that it should be returned to the donor either on his revocation or on the predecease of the donee, is little known in our practice;" and he adds, "No deed, though gratuitous, is revocable after delivery, if a faculty to revoke be not reserved in it; for the implied power of the granter to revoke undelivered deeds, is excluded by delivery." This is correct, according to modern practice. See the cases referred to *supra*, p. 194; and see Bell's Prin. § 1868.

(*f*) *Fyfe v. Kedslie*, 6 Mar. 1847, 9 D. 853.

*Miller v.
Milne's Trs.*

any bonus that might accrue on the shares during his life, and likewise to transfer any part of them when he thought proper, was held, in conformity with the opinions of the whole judges, to be a *donatio mortis causa*, and effectual after the granter's death (a). In the opinion of Lords Kinloch, Wood, and Benholme (b), in *Miller v. Milne's Trustees*, who were of the majority of the Court, a bequest conveyed in a letter to the legatee, and delivered in the lifetime of the granter, is a *donatio mortis causa*, and is subject to the same conditions and rules of interpretation as a legacy. Such a bequest is accordingly personal to the donee, and lapses in the event of his predeceasing the granter. The above were cases upon written assignations; but it was laid down in the early case of *Mitchell v. Wright* (c), that a bequest might be made of a subject or sum of money exceeding the value of L.100 Scots by delivery. In modern practice, it is necessary that the party claiming a donation alleged to have been made by way of delivery should undertake the onus of proving the donation, in a question with the trustees or representatives of the granter (d).

Legacy in a
bill or receipt.

The cases in which effect has been given to bequests constituted by the indorsation of bills (e) and receipts (f), may also be referred to the category of *mortis causa* donations.

(a) Lord Mackenzie observed: "He meant clearly to make a *donatio mortis causa*; and while I find all the features of such a donation here, I cannot find those of an ordinary trust" (9 D. 865); and see *Duguid v. Caddell's Trs.*, 29 June 1831, 9 S. 844.

(b) 21 D. 388. Lord Neaves appears to have taken the same view of the nature of the document in this case:—"I have already said that, regarding them (the letters) merely as a form of legacy or donation *mortis causa*, which I think the more correct view, I consider them to have been personal to the donee, and thus to have become ineffectual through his predecease (21 D. 391-2). Lord Murray, *Idem*, p. 392.

(c) *Mitchell v. Wright*, 1759, M. 8082.

(d) See the cases cited in Chapter VIII. Section 2, *supra*, p. 193.

(e) *Murray v. Mather*, 6 Mar. 1818, Hume, 275; *Adam v. Johnston*, 1782, M. 1416; *Steel v. Wemyss*, 1793, M. 1409; *Anonymous*, 1752, 5 Br. Sup. 802. It has been decided, however, that a bill payable after death is not a habile mode of constituting a bequest, as this is not a case of transference of a security with the intention of constituting a bequest, but an attempt to give to the bill itself a testamentary operation, contrary to the legitimate purpose of the instrument (*Wright v. Wright*, 1761, M. 8088; *Davie v. Millie*, 1786, M. 8107; *Stewart v. Fullarton*, 1782, M. 1408).

(f) Compare *Craig v. Galloway*, 17 July 1861, 23 D. Ap. Ca. 12, *reversg.* 22 D. 1211, with *Cuthill v. Burns*, 20 Mar. 1862, 24 D. 849.

A verbal or nuncupative legacy is effectual only to the extent of L.100 Scots (a); and several legacies may be bequeathed to that extent. The rule is to be received subject to the following qualifications:—First, A bequest of larger amount may, as already explained, be made by delivery of the subject to the grantee *intuitu mortis*. Secondly, A nuncupative legacy for a larger sum than L.100 Scots is effectual to the extent of L.100 (b). Thirdly, A verbal direction to an executor and *residuary legatee* to pay a legacy of any amount is effectual as a trust; but such trust can only be proved by the writ or oath of the executor (c). But, fourthly, It is incompetent to refer to the oath of a mere *trustee* for the purpose of proving a verbal legacy beyond the customary amount (d).

Nuncupative bequests.

The provisions of the Act 59 Geo. III. cap. 62, § 7, by which testamentary papers signed by mark are made effectual to convey deposits in savings banks not exceeding L.20, seem to be repealed by 5 & 6 Wil. IV. cap. 57, § 2.

Savings Bank Act.

III. *Ascertainment of the Legatee.*

The questions falling to be considered under this topic are as follows:—First, The interpretation of technical terms designative of a class of beneficiaries; such as “heirs;” “executors;” “heirs and assignees;” “children;” “issue,” etc. This subject has been already considered in the first section of Chapter VII., in connection with the rules of construction of technical terms in deeds of trust and conveyances (e). Secondly, The construction of popular terms,

Questions as to *designatio personarum*, etc.

(a) See Ersk. 3, 9, 7, who refers the rule to the general principle of the law of Scotland, that no obligation for a sum exceeding L.100 Scots can be proved by witnesses. Bell's Prin. § 1868.

(b) Ersk. 3, 9, 7; *Forsyth's Trs. v. McLean*, 18 Jan. 1854, 16 D. 343; *Kelly v. Kelly*, 8 Mar. 1861, 23 D. 703.

(c) Erskine & Bell, *supra*; *Hannah v. Guthrie*, 1738, M. 3837; 5 Br. Sup. 203; Elchies, Legacy, No. 5.

(d) *Forsyth's Trs. v. McLean*, *supra*.

(e) *Supra*, p. 125. The following cases on the construction of legacies may also be noted. In *Lowden v.*

Adam (1805, M. “Tack,” No. 10), a destination to heirs and executors was held to apply to heirs-at-law, exclusive of heirs *provisione hominis*. The word executors was held to be surplusage. (See p. 127, *supra*.) In *Blair v. Blair* (cited p. 128, *supra*), it was also decided, that in a destination of heritable and moveable estate to heirs and executors, the word “executor” means next of kin, and not executor by deed. On this point, compare *Lawson v. Stewart* (cited p. 132, *supra*). In *Clarke v. Clarke* (18 Dec. 1832, 11 S. 220), the mother-in-law of a landed proprietor left a legacy to be divided after her death among her children,

such as "relations," and the like, is dealt with in the chapter on Implied Trusts (a); to which chapter, as well as to that on Charitable Trusts, we also refer for an exposition of the principles which have guided the Court in the interpretation of indefinite bequests for charitable and public purposes. Thirdly, A bequest which is too indefinite, as stated, to be carried out by the Court, may nevertheless be effectuated by means of a discretionary power given to trustees. This has been called *legatum in arbitrio alieni*. The interpretation of such powers also has been considered elsewhere (b). This exhausts the subjects necessary to be considered in relation to the ascertainment of the legatee.

SECTION II.

CLASSIFICATION OF LEGACIES, AND LEGAL CHARACTER OF THE LEGATEE'S INTEREST.

Legacies distinguished according to different principles of classification.

The legal character of the legatee's interest may be considered in relation—(1) to the subject of the legacy, whether heritable or moveable; (2) in relation to the duration of his interest, whether fee, liferent, or reversion; (3) in relation to the quality of the interest, whether a right to a specific thing, or to a sum of money payable out of the estate; and (4) in relation to the limited or unlimited character of the interest, whether a legacy of quantity or a residuary interest.

Legacy, heritable or moveable.

1. First, as to the subject of the legacy. The subject bequeathed, or the fund out of which legacies are payable, may either be heritable or moveable. The expression, "legacy of heritage," has been usually employed in a more restricted sense, as denoting a

but declaring that "the heir entitled to succeed to the estate should have no share." It was held that the eldest son of the testatrix's daughter was the party described as the heir *entitled* to succeed, although his father, being a fee-simple proprietor, had the power of disinheriting him. A number of cases on the construction of the word "heirs" will be found in the Dictionary, *voce* "Clause;" but observing that the interpretation must be gathered from the con-

text, and that the context in these cases is quite different from the phraseology of modern deeds, it seems useless to dwell upon them.

(a) Chapter VIII. See particularly pp. 152-155 for cases on *designatio personarum* and mis-description of beneficiaries.

(b) See Chapter XXII. Section 3 (Powers of Division), Chapter XX. Sections 1 & 2 (Powers of Trustees for Charitable Purposes).

legacy constituted by way of burden upon the estate conveyed to an heir; such burdens being effectual against disponees, on the principle of approbate and reprobate (*a*).

Heritable estate may also be the subject of bequest under a trust disposition and settlement. A very large proportion of the decided cases upon legacies have arisen under conveyances to trustees, embracing both heritable and moveable estate. It has frequently been observed, that a trust disposition of heritable estate has the effect of investing the settlor with a power of testing upon the property (*b*); though it must be added, that the exercise of this power is liable to be defeated by the operation of the law of death-bed (*c*). It is matter of trite law, that a settlement not expressed in dispositive language, and therefore not operative as a conveyance of heritage, is equally ineffectual for the purpose of burdening the estate (*d*).

Disposition of heritable estate subject to legacies.

2. Again, the subject of a legacy may be either, (1) the capital or fee of a sum of money or specific subject; or (2) a liferent interest in or terminable annuity out of it; or (3) a reversionary interest in the capital. The nature of the respective interests of the usufructuary and reversionary proprietors of beneficial interests, in so far as these are affected by the peculiar tenure of trust estates,

Legacy of capital, interest, or reversion.

(*a*) *Dundas v. Dundas*, 22 Dec. 1830, 4 W. & S. 460. See the subject of election under the law of approbate and reprobate treated in Chapter XLII.

(*b*) Per Lord Curriehill in *Mackilligan v. Mackilligan*, 18 D. 87. In *Brack v. Hogg* (25 Feb. 1831, 5 W. & S. 61), the point was raised very purely. The settlor having executed a trust disposition of his heritable estate in conformity with the requisitions of the law of Scotland, containing a direction to the trustee to convey "to such person or persons as I shall specify and name in my will, or by any separate letter or writing to that effect," thereafter executed in Jamaica a latter will and testament disposing of the residue in these terms: "I give and bequeath to my nephew, Adam Hogg, the residue and remainder of my property, real, personal, and mixed, consisting of lands, houses, etc., in Berwickshire, Great Britain." In

affirming the judgment of the Court of Session, sustaining the bequest, Lord Lyndhurst observed:—"The will was intended by the party to be an execution of the power contained in the first deed. It is impossible to consider the nature of the transaction itself, as mentioned in the first deed, and the description of the property, and not to come to the conclusion that the party intended to execute that power. The question that remains then is, whether the mode of execution was sufficient." And on the authority of the case of *Willoch v. Auchterlony* (1769, M. 5539), his Lordship was of opinion that it was (5 W. & S. 69). See also Bell's Pr. § 1866, and cases there cited.

(*c*) See pp. 63-65 as to the influence of the law of death-bed upon deeds of alteration, and the mode of evading its operation.

(*d*) *Govan v. Seton*, 28 Jan. 1812, F. C.

has already been considered in treating of the beneficiary's right during the subsistence of the trust (*a*). The construction of terms of destination denoting interests in life and fee has been considered in the introductory chapter on Construction (*b*). Questions between life tenants and heirs as to interest and accessions, burdens and abatements, are dealt with in the third section of this chapter (*c*).

Legacies,
general, spe-
cific, or demon-
strative.

3. Next, as to the legal character of the legatee's interest. According to this principle of division, three classes of legacies are distinguished—general, demonstrative, and specific. A general legacy—*legatum quantitatis*—is a legacy not of a special article or debt, but of a certain amount, which may be measured either in money or in goods of a particular description or class (*d*). A specific legacy is a bequest of a particular subject, whether corporeal or incorporeal; a definition which includes sums of money due under specific securities (*e*). A demonstrative legacy is a gift of a sum of money out of or charged upon a particular subject or security; and is similar in its legal properties to a general legacy, being in truth a legacy of quantity, and not of substance (*f*).

(*a*) Chapter XXVIII.

(*b*) Chapter VII. ; see pp. 140–148.

(*c*) *Infra*, p. 231.

(*d*) Ersk. 3, 9, 11 & 12; Bell's Pr. § 1873. By means of a trust, general legacies may be made to comprehend certain of the qualities of specific legacies. For example, if a settlor direct his trustees immediately after his death to invest a sum in the funds for the use of a general legatee, and the trustees are unable from want of funds to make the investment until some time after, they must nevertheless purchase a quantity of stock equal to what they could have bought with the legacy at the proper time (*Horsburgh v. Horsburgh*, 1 Mar. 1848, 10 D. 824).

(*e*) Ersk. *supra*; Bell's Pr. § 1874.

(*f*) This variety of the general legacy appears to have escaped the attention of our institutional writers, though it has been recognised under this designation in English decisions (see 2 Wh. & T. L. Ca. 236), and in the civil law (Voet ad Pand. 35, 1, 5).

An example will be found in the case of *Bell v. Brodie*, 16 Feb. 1847, 9 D. 712. The testator executed certain *mortis causa* deeds in favour of a trustee, upon trust to pay an annuity to another party, and bound himself to pay such sum as might be necessary to secure it. Previous to his death, he had put certain sums of money into the hands of his trustee, and directed the annuity to be paid *from the interest of these sums*. The Court held that the object of the special direction was merely to secure the annuities; that the bequest was not specific, and that therefore the estate remained bound for payment of the annuity. The decision in *Hagart v. Hagart* (14 Nov. 1834, 13 S. 35), holding a bequest of the testator's whole income for the year of her death equivalent to a special legacy, appears to be erroneous in principle, as there was here no identification of the property, but merely a measure of the value of the legacy.

A direction to purchase a particular subject is not a specific legacy, but partakes rather of the nature of a demonstrative legacy. On this principle, it has been held that general legacies are preferable to the right of the residuary legatee under a direction to purchase an estate with the residuary funds, and to convey it to him (a).

Direction to purchase is equivalent to a general legacy.

Specific legacies are also distinguished from general by the nature of the rights which they respectively confer upon the legatee.

Specific legacies, how distinguished from general

First, A specific legacy has the effect of an assignation *mortis causa* to the subject; a general legacy confers only a *jus crediti* (b).

Secondly, Specific legacies are preferable to general or residuary bequests. The debts of the estate are a burden upon the latter (c);

and although the rights of the special legatee must necessarily yield to those of the testator's creditors, it has been held that creditors attaching the subject of a specific legacy must assign their debts to the legatee (d).

A legacy for mournings seems to be preferable over other general legacies (e). In virtue of his *jus in re*, a special legatee may, with concurrence of the executor, direct action for recovery of the subject against the party in possession (f).

Thirdly, From the nature of the special legatee's interest, it follows that his right under the testament will be extinguished if the subject perish before it is delivered to him; for *res perit suo domino* (g); and the appropriation of the subject to other purposes, e.g., by uplifting the sum contained in a bill or bond specially bequeathed, operates as an implied revocation or ademption of the bequest (h).

Ademption of special legacies.

(a) *Hamilton v. Bennet*, 16 Aug. 1833, 6 W. & S. 533, affg. 10 S. 330; *Train v. Bell's Trs.*, 26 May 1824, 3 S. 68. On the construction of trusts for the purchase of heritable estate, see Chapter XVIII., *supra*.

(b) Bell's Pr. § 1875.

(c) Ersk. 3, 9, 12; citing *Monro v. Scott's Exrs.*, 1630, M. 8048. See p. 229, *infra*.

(d) *Balmerino v. Balmerino's Crs.*, 1746, M. 8074.

(e) *Caldwall v. Caldwell*, 1736, M. 8066. See I. 416, *supra*.

(f) Ersk. *supra*. See *Gray v. Cockburn*, 1711, M. 8062; *Forrester v. Clerk*, 1627, M. 2194.

(g) *Wauchope v. Wilson*, 1724, M. 8063.

(h) *Pagan v. Pagan*, 26 Jan. 1838, 16 S. 383, and cases there cited; *Jack v. Lauder*, 1742, M. 11357; *Presby. of Kirkcudbright v. Blair*, 1742, Elchies, Legacy, No. 10; M. 8066; *Panton v. Gillies*, 22 Jan. 1824, 2 S. 632; and see Section III. *infra*, as to interest and accessions, and the extent to which special legacies may be affected by the claims of creditors and annuitants. The doctrine of the ademption of special legacies was established in England by Lord Thurlow's decision, *Ashburner v. Macguire*, 2 Bro. Ch. Ca. 108, where a legacy of

Legatum liberationis.

In the category of specific bequests we must include the case of a legacy to a debtor of the amount of his debt, called *legatum liberationis*.

a bond was held to be partially adeemed by the testator having received partial dividends on the debt in bankruptcy; and a legacy of L.1000 East India Stock was held to be adeemed *in toto* in consequence of the testator having sold the stock. In the subsequent case of *Stanley v. Potter*, the same eminent judge remarked that the test of ademption was, whether the thing remained at the testator's death; as, if the testator had given a particular horse, which died or was disposed of in his lifetime, when of course there was nothing on which the bequest could operate. "The idea of proceeding," he continued, "on the *animus adimendi* has introduced a degree of confusion into the cases which is inexplicable, and I can make out no precise rule from them upon that ground. . . . It will be a safer and clearer way to adhere to the plain rule before mentioned, which is to inquire whether the specific thing given remains or not" (2 Cox, 182). A specific legacy of corporeal moveables has been held to be adeemed by their total loss or destruction during the life of the testator, although they may have been insured, and their value recovered from the insurers (*Durrant v. Friend*, 5 De G. & Sm. 343).

The generality of the principle has been subjected to a severe test in some of the more recent English cases upon reinvestment. In *Barker v. Rayner*, 5 Madd. 208, the testator bequeathed two policies of assurance upon the life of his wife to his executors upon certain trusts; and his wife having predeceased him, he received the amount, and after paying out of the proceeds a debt, in security of which they had been assigned, invested the balance in securities, upon which it remained until his death. Sir John Leach, V.C., held that the legacy was adeemed, on the

principle that the Court could only inquire whether the specific thing remained at the death of the testator, and could not enter into the consideration whether it had or had not ceased to exist by an intention on the part of the testator to adeem it. This decision was affirmed by Lord Eldon on appeal, 2 Russ. 122. In *Gardner v. Hatton*, 6 Sim. 93, the testator bequeathed L.7000, secured by the mortgage of a particular estate. After the date of the will the principal sum and interest were received by the testator's agent, on his account, who immediately afterwards invested L.6000 of it upon another mortgage, upon which it remained at the testator's death. Sir L. Shadwell, V.C., ruled that the legacy was specific, and that, as the testator had received the whole of the debt, it was a clear case of ademption. It has been considered an open question, whether a testator, who having made a specific bequest of stock, sells it, and afterwards purchases the same or a less amount of the same stock, thereby revives the bequest (see 2 Wh. & T. L. Ca. 249); but we do not see upon what principle this point can be distinguished from the case of reinvestment on mortgage noticed above.

The conversion of Government stock from one denomination into another by Act of Parliament, or of railway shares into consolidated stock, is not ademption (see *Oakes v. Oakes*, 9 Hare, 666, and cases there cited). Nor will the destination be affected by a mere change of the title, as by a transference of the subject of bequest from the names of trustees to that of the testator (*Dingwell v. Askew*, 1 Cox, 427). Nor will the unauthorized act of the testator's agents, or of his guardians in the event of supervening incapacity, have the effect of disappointing the special legatee. See *Taylor v.*

With reference to this class of bequests, it has been decided that a general bequest to certain debtors in the form of "a free discharge of everything they may owe him at his death," did not comprehend bills coming into the hands of the legatee on account of the testator; as these were regarded not as debts, but as in the nature of a special trust (*a*). A simple legacy to a debtor may be compensated by the debt, upon proof that it is resting owing (*b*). As to legacies to the testator's *creditors*, the presumption of the law of Scotland is rather adverse to donation. The satisfaction of debts by legacies is reserved for discussion in a subsequent chapter (*c*).

Legatum rei alienæ is a bequest of a subject not belonging to the testator. The rule of construction, which has been adopted by the Scotch Courts from the civil law (*d*), is, that if, on the one hand, the testator erroneously supposed the thing bequeathed to be his own (*e*), or erroneously believed the subject to be moveable, and within the power of his executor (*f*), the legacy is ineffectual; but on the other hand, if he knew that it was not his own, the legacy is effectual, on the principle that the testator intended that his executor should purchase it (*g*). On the same principle, a legacy of a subject not disposable by will may be effectual as an obligation upon the testator's executors (*h*).

Legatum rei alienæ.

A considerable mass of decisions have been collected by English jurists on the question, What words imply a specific as distinguished from a demonstrative legacy? These relate to legacies of money in a particular place; legacies of debts; legacies of stock; and legacies connected with realty. While illustrating the distinction in question, they add little or nothing to our means of applying the prin-

Terms which import a demonstrative or specific legacy.

Taylor, 10 Hare, 475, decided by V.C. Wood, where the principles previously recognised as to conversion by trustees and guardians in questions between heir and executor, were held to be applicable to the claims of specific legatees.

(*a*) *Graham v. Denniston*, 1792, M. 8108; Bell's Oct. Ca. 302; *Dougall v. Dougall*, 1789, M. 19467.

(*b*) See *Reid v. Hope's Trs.*, 6 May 1825, 1 W. & S. 172.

(*c*) Chapter XLI. Section 3.

(*d*) Inst. Lib. 2, Tit. 20, § 4.

(*e*) Ersk. 3, 9, 10; Bell's Pr. § 1882.

(*f*) Ersk. *supra*; *Wardlaw v. Fraser*, 1663, M. 5703.

(*g*) *Falconer v. Dougall*, 1664, M. 13301.

(*h*) *Catto v. Gordon*, 1748, M. 8077; *Cranston v. Brown*, 1674, M. 8059; *Kinloch v. Lundie*, 1663, M. 8052; *Drummond v. Drummond*, 1624, M. 2261. The principle has been already noticed under the head of Legacy of Heritage. See *Dundas v. Dundas*, 22 Dec. 1830, 4 W. & S. 460, affg. 7 S. 241; *Redford v. Redford*, 5 Dec. 1816, Hume, 884.

ciple. In most of the cases the character of the bequest is ascertained by inspection; few of them present any difficulty. As it is necessary to put a limit to the citation of English cases, we do not propose to enter further upon this subject (a).

Import of
terms appli-
cable to sub-
ject of bequest.

To complete the discussion of specific legacies, we annex a brief statement of the import of the English and Scotch decisions upon the meaning of words descriptive of special subjects of bequest. "Goods, gear, and sums of money," will carry corporeal moveables generally; not debts or other moveable rights (b). "Goods, gear, debts," etc., does not carry heritable debts secured by adjudication (c). "Goods and gear, whether heritable or moveable," will not carry a lease (d). "Moveables whatsoever," coupled with words descriptive of corporeal moveables, will not carry moveable bonds (e). "Moveable estate," following an enumeration of corporeal moveables, does not include moveable rights (f). A legacy of moveables has been held to include heirship moveables (g). The word "estate" (h), either alone or in conjunction with the expletives heritable and moveable (i), or moveable and immoveable (k), is *nomen universitatis*, and includes property of every description. "Cash" includes current coin and bank notes, but not bonds, bills, or other securities (l). "Free proceeds" of land, includes the price of thinnings of woods (m).

(a) An epitome of the cases we refer to, will be found in 2 Wh. & T. L. Ca. 236-242.

(b) *Mochrie v. Linn*, 1736, M. 5018, Elchies, "Implied Will," No. 1; *Fraser v. Smith*, 1776, M. 2322, Hailes, 709; *Earl of Fife v. M'Kenzie*, 1795, M. 2325; *Waddell v. Colt*, 1789, M. 5022; *Pet. Galloway*, 12 Jan. 1802, M. 15950; *Brown v. Henderson*, 3 Dec. 1805, M. "Clause," No. 5.

(c) *Ross v. Ross*, 10 Apr. 1771, 2 Paton, 254, affg. M. 5019.

(d) *Paterson v. Fairish*, 9 Feb. 1800, Hume, 128; *Sutherland v. Jeffrey*, Feb. 1805, Hume, 133.

(e) *Dunbar's Trs. v. Dunbar*, 15 Jan 1808, Hume, 267; *Kerr v. Young*, 1745, M. 2274.

(f) *Carsewell's Trs. v. Carsewell*, 9 Feb. 1858, 20 D. 516.

(g) *Ferguson*, 1682, 1 Fount. 193.

(h) *Moore P. C. Ca.* 76, cited *supra*, p. 137, where a fuller exposition is given of the cases on the question, what words carry real estate. And see *Stewart v. Neilson*, 3 Feb. 1860, 22 D. 646; and *Munro v. Munro*, 17 Dec. 1825, 4 S. 328.

(i) *Glover v. Brough*, 7 Dec. 1810, F. C.; *E. of Eglinton v. E. of Eglinton et al.*, 28 May 1861, 23 D. 1369.

(k) *Welsh v. Cairnie*, 28 June 1809, F. C. Compare *Brand v. Brand*, 1734, M. 15941.

(l) *Jarvie v. Pearson*, 5 July 1860, 22 D. 1395. Compare *Smith v. Donaldson*, 10 June 1829, 7 S. 734.

(m) *Breadalbane's Trs. v. Pringle*, 19 Jan. 1854, 16 D. 359.

The Scotch Reports do not furnish many instances of decisions upon the construction of specific bequests of corporeal moveables. The meaning of "furniture" has been fixed with tolerable certainty. It includes articles of domestic use, but not books nor wine, nor, of course, money or securities (*a*). A legacy to a lady, who was resident in the testator's house, of a quantity of plate, with "the whole of the furniture in her own bed-room, and any other she may choose for furnishing her house," was held to imply only a power of choosing liberally, but fairly, any other articles of furniture of similar extent and value with the furniture of her own bed-room (*b*). A universal bequest to two legatees, including among other articles the testator's wearing apparel, was held, in *Blair v. Blair* (*c*), to entitle one of them to demand a specific conveyance of his share of the articles in question (*d*).

Construction
of legacies
of corporeal
moveables.
Furniture.

Right of selection.

(*a*) *Bell's Pr.* 1885; *M'Nab v. Spittal*, 1797, M. 2303; *Ker v. Young*, 1745, M. 2274; *Rankeillor v. Ayton*, 1709, M. 5759; *Cunningham v. Livingston*, 1787, M. 11660; 5 Br. Sup. 195.

(*b*) *Reed v. Lord Strathallan*, 21 May 1835, 13 S. 810; and see 12 S. 426. In several English cases, a legacy of so many articles forming part of a stock of the same description has been held to give the legatee a right of selection (*Jacques v. Chambers*, 2 Coll. 435; *Richards v. Richards*, 9 Price, 226; *Kennedy v. Kennedy*, 10 Hare, 438).

(*c*) *Blair v. Blair*, 26 Feb. 1831, 9 S. 514.

(*d*) In a previous chapter (*supra*, p. 139) we have given an abstract of the most important English decisions on words descriptive of real or personal estate. The following summary of the decisions on the construction of the terms of special legacies is taken from Messrs Wolstenholme and Vincent's edition of Jarman on Wills, p. 721:—

The words "household goods," or "furniture," will include pictures hung up, and plate and house linen (Amb. 605; 2 P. W. 419; 5 Russ. 312), unless these words are used elsewhere in the will in contradistinction thereto; also

tenant's fixtures, unless affixed to the freehold (10 Sim. 186; Mos. 112; 1 P. W. 94); and prize medals, coins, and trinkets, if framed and hung, or otherwise disposed for ornament (21 L. T. 40; 5 Russ. 321); but not books (3 Atk. 201, Amb. 605, Mos. 112); or wines or other consumable articles (3 Ves. 311, 3 P. W. 334); or goods belonging to the testator in the way of, or used in carrying on trade (2 P. W. 302, 1 Ves. 97, Amb. 611, 7 D. M. & G. 55); or farming stock (3 Jo. & Lat. 727, 29 L. J. Ch. 875). But in *Cornwall v. Cornwall*, 12 Sim. 303, Sir L. Shadwell held that books were articles of domestic ornament. Now, this being the ground on which pictures are included in the word "furniture," that word ought also to include books, but it does not; so that Sir L. Shadwell's opinion is of doubtful authority. Of course books will be included in a bequest of furniture, if the testator's intention so to do can be collected from the will, *Ouseley v. Anstruther*, 10 Beav. 462; see also *Cole v. Fitzgerald*, 3 Russ. 301. And under the terms "household furniture, implements of household and articles of vertu," telescopes have been held to

Legacies,
limited, or of
residue.

4. Another division of legacies, according to the legatee's interest, is that into legacies of limited amount, and legacies embracing the whole or an aliquot part of the free succession. The former class are those which have already been under consideration; the latter are termed residuary bequests, or universal legacies. The interest of a residuary legatee is distinguished by many remarkable properties from that of general and special legatees, and may justly be regarded as a distinct species of beneficial interest. On this account, and also because residuary destinations usually form the subject of a special trust purpose, the fulfilment of which is postponed to the payment of debts and legacies, we have reserved the consideration of residuary interests for a separate chapter.

Division of
residue
amongst gene-
ral legatees.

General legatees may also be made the recipients of the residuary interest, as when a testator bequeaths legacies to certain parties, and directs that the residue of his estate be divided amongst those parties, either equally or in proportion to the amount of their legacies. In a case of this kind, where a testatrix, after leaving numerous legacies, varying in amount, directed the residue of her funds to be divided "between and among the whole legatees whose legacies exceed L.100;" but that, in the event of her funds being insufficient for payment of the foresaid legacies, "each of them which exceeds L.100 sterling should suffer proportional abatement," the Court held that the division of the residue must be equal; for

pass, 2 De G. & S. 425; as to a bust *quære*, 1 Beav. 189. The words "household furniture and other household effects," it seems, extend to all that is in the house for use, consumption or ornament; and have been held to comprise pistols, apparatus for turning, models, pictures, organ, parrot, books, wines, and liquors, but not a pony or cow, or a fowlingpiece, unless used for domestic defence, *Cole v. Fitzgerald*, 1 S. & St. 189; S. C. on appeal, 3 Russ. 301, and n.; *Stone v. Parker*, 29 L. J. Ch. 874; nor articles exclusively of personal ornament, 2 Kay & J. 635. But the circumstance that the article has been sent away for repair or sale will not exclude it, 2 Jur. N. S. 514. As to the words

"live and dead stock," see 3 Ves. 811, 3 Mer. 190, 12 Beav. 357. Growing crops, it seems, will pass under a bequest of stock of a farm, 6 East. 604, n.; or stock upon a farm, 8 East. 339, but see 5 Russ. 12; and see 1 Roper on Leg., by White, 249. "Moveables," unrestrained, will take in all pure personalty, Mos. 296; and articles temporarily removed from a place will pass as articles in that place, 4 B. C. C. 537; but not articles permanently removed, 3 Mad. 276, 21 Beav. 548, 1 Jur. N. S. 250; nor articles intended to be, but never yet, taken thither, 2 De G. & S. 425. Under a gift of "plant and goodwill," the house of business held at rack-rent was decided to pass, *Blake v. Shaw*, 1 Johns. 732.

as there was no direction to divide in proportion to the shares, the legal presumption was for an equal division (*a*).

SECTION III.

EXTENT OF THE LEGATEE'S INTEREST.

The points to be considered relate, *first*, to the extent of the legatee's interest, on the assumption that the testator has left funds sufficient for the execution of all the purposes of the trust; and *secondly*, as to the abatement of legacies in consequence of the existence of burdens, or of a deficiency of free funds.

I. *Extent of the Legatee's Interest under the Trust.*

The share of a legatee, as appearing upon the face of the deed, may, on the one hand, be enhanced by accessions, or increased by the addition of interest; and, on the other, it may be diminished by burdens, claims of debt, and legal deductions.

Legacy may be increased by interest or accessions.

A legacy of quantity, whether general or demonstrative—*e.g.*, payable out of a particular fund—does not seem to be susceptible of increase by accession; for the rule is, that all additions to the general estate, whether expressly within the view of the testator or not, fall into residue. On this principle it has been decided, that where a debt is secured by a policy of assurance which only becomes available at the testator's death, any bonus accruing upon the policy falls into the general estate, notwithstanding that the sum assured was intended to be an equivalent for the debt (*b*). A special legatee, however, is in a different position; and it is reasonable to conclude that as his right to the subject falls with the subject, it is also susceptible of being enlarged by accessions.

Legacy of quantity not susceptible of increase by accession.

Special legacy carries right to accessions.

A liferenter of shares of stock is not entitled to the enjoyment of an extraordinary dividend or bonus, but only to the life interest of it (*c*). On the other hand, a legatee of the fee, subject to a substi-

Accessions belong to fee, and liferenter has only the interest.

(*a*) *Pitcairn v. Thomson*, 8 June 1203; *Shand v. Blaikie*, 31 May 1859, 1853, 15 D. 741. 21 D. 878.

(*b*) *Marquis of Queensberry v. Scottish Union Ins. Co.*, 10 July 1839, 1 D. 441. (*c*) *Rollo v. Irving*, 27 July 1803, 4 Paton, 521, revg. M. "Liferenter," No. 1.

tution, with a proviso against gratuitous or onerous disposal, was found entitled to the benefit of a bonus (a). Where trustees are directed to hold stock for the benefit of a party in liferent, with a power of changing the securities, the right of the liferenter to the current dividend cannot be prejudiced by a sale; and accordingly, in one case, where the trustees received a sum of L.10 per share "in lieu of dividend," over and above the price of L.140 per share, and a slump sum for certain other stock, the liferenter was found to be entitled to a proportion of the sum of L.10 per share, corresponding to the period during which the trustees had held, and to a like proportion of the dividend, as declared, upon the second portion (b). Where a truster directed his estates to be conveyed, in terms of the destination, at the period of one year after the current year in which his death should take place, and appointed the free rents accruing prior to that event to be applied in payment of debts, and the yearly rents thereafter to be paid to his daughter, it was held that the words "current year" meant the civil and not the agricultural year (c).

Apportionment
Act.

The Apportionment Act, 4 & 5 William IV. cap. 22, does not apply to testamentary bequests of the rents current during the year of the testator's death; and accordingly, where a testator directed the whole free rents of a specific heritable subject to be paid to his widow during her life, commencing at the first term of Whitsunday or Martinmas after his death, she was held entitled to payment at the first term after her husband's death of a full free half-year's rent, besides aliment and a sum for mournings (d).

When a legacy
of interest
will carry the
capital.

A legacy of the interest of a fund may, if such appears to be the intention of the testator, be construed as a bequest of the entire subject; the failure to appropriate the capital affording, in the absence of any express indications of intention, a presumption that the entire estate was intended to be given to the liferenter (e).

(a) *Cumming v. Cumming's Trs.*, 26 Feb. 1824, 2 S. 743.

(b) *Donaldson v. Donaldson's Trs.*, 12 Dec. 1851, 14 D. 165.

(c) *Williamson v. Hay*, 19 June 1855, 17 D. 960.

(d) *Thomson v. Douglas*, 15 July 1856, 18 D. 1240; see *Trotter v. Cun-*

ingham, 26 Nov. 1839, 2 D. 140; *Lockhart v. Lockhart*, 1 Feb. 1839, 1 D. 443.

(e) Compare *Sanderson's Excrs. v. Kerr*, 21 Dec. 1860, 23 D. 227, with *Burnsides v. Smith*, 10 June 1829, 7 S. 735. See I. 140, *supra*, where the English cases are referred to.

With respect to interest on legacies, the former rule was that interest was payable, at all events, from twelve months after the testator's death (*a*). By modern practice, interest is held to be due from the date of the testator's death, or from the period at which the funds become productive (*b*). In the case of *Ogilvie's Legatees v. Hamilton* (*c*), interest was allowed upon demonstrative legacies only from the first term after the lapse of three years from the testator's death, on the ground that they were declared by the will not to be payable until after the sale of the subject upon which they were charged, and that three years was a reasonable time to allow for the execution of a power of sale. But this case would not now be followed as a precedent, as it has since been settled that, in the absence of any express direction as to the period of sale, the right to the beneficial enjoyment emerges on the completion of the first year after the testator's death (*d*).

From what period interest is payable on legacies.

(*a*) *M'Allister v. M'Allister*, 29 June 1827, 5 S. 862, affirmed on another point, 4 W. & S. 148; *Stevenson v. Macintyre*, 30 June 1826, 4 S. 776. On the other hand, the legatee is chargeable with 5 per cent. interest and accumulations on advances made to him beyond the value of his share (*Plaine v. Thomson*, 3 Dec. 1836, 15 S. 194).

(*b*) *Duff's Trs. v. Scripture Readers*, 19 Feb. 1862, 24 D. 452.

(*c*) *Ogilvie's Legatees v. Hamilton*, 10 Dec. 1833, 12 S. 189.

(*d*) See the cases upon directions to purchase and entail lands, in Chapter XVIII. Section 2. According to English practice, if a testator has fixed no time for the payment of general legacies, they are held to be payable twelve months after his decease, and to carry interest from that date (*Collyer v. Ashburner*, 2 De G. & Sm. 404; *Wood v. Penoyre*, 13 Ves. 333); and it is immaterial that the estate is not productive (*Pearson v. Pearson*, 1 S. & L. 10). But there are several exceptions to this rule:—

1. If a legacy is found to be in satisfaction of a debt, interest is of course due from the testator's death upon the

amount of the debt as at that date (*Clark v. Sewell*, 3 Atk. 99).

2. Where a testator directs a legacy to be paid before the expiration of the period of twelve months from his death, interest will be due from the period of payment (*Lord Londesborough v. Somerville*, 19 Beav. 295). And if a testator direct the legacies to be invested for the benefit of the legatees, at a period beyond the expiration of twelve months from his death, interest will nevertheless be due from the end of the first year after his death, unless the contrary is expressly directed (*Varley v. Winn*, 2 K. & J. 700).

3. Interest is due upon a legacy by a father to his legitimate minor child *a morte testatoris* (*Beckford v. Tobin*, 1 Ves. 310); unless the father has already made a competent provision for the child (*Re Rouse's estate*, 9 Hare 649; *Donovan v. Needham*, 9 Beav. 164). The rule has been extended to provisions made by a person putting himself *in loco parentis* (*Wilson v. Maddison*, 2 Y. & C. Ch. Ca. 372).

4. An annuity is held to run from the testator's death, and the first payment falls to be made one year there-

Interest is due on specific legacies from Testator's death.

Appropriation of interest where distribution of capital postponed. Postponement to period of majority or marriage.

On the ground already stated, interest is due upon specific legacies from the testator's death, notwithstanding that the period of payment is expressly postponed (*a*); and in one case accumulated interest was allowed upon specific legacies, on the ground that specific legatees were entitled, equally with the legatees of the residuary interest, to obtain the entire produce of the funds bequeathed to them (*b*). Dividends declared before, but not payable until after the testator's death, have been held to belong to the specific legatee (*c*).

The most difficult questions connected with this subject are those which relate to the appropriation of interest, where the payment of legacies and provisions is conventionally postponed, and no directions are given regarding intermediate profits. In the case of legacies to minor children by a father or person standing *in loco parentis*, payable at the majority or marriage of the beneficiary, the object of the postponement is presumed to be the protection of the minor's estate, and interest is therefore due *a morte testatoris* (*d*), and may be appropriated, in so far as necessary, to the maintenance of the minor (*e*). And even although the vesting of the capital is rendered uncertain by the payment being made contingent on the attainment of majority, the legatee's right to the intermediate profits will, in the absence of any express direction to accumulate, vest at each term, and will therefore transmit to his representatives (*f*). A destination of lands in trust for behoof of a contingent heir, was held

after (*Gibson v. Bott*, 7 Ves. 96). And a legatee of the life interest in a residue of personalty, is entitled to the proceeds from the testator's death. See the cases cited, 2 Wh. & T. L. Ca. 258.

5. Where a legacy is made payable at a particular time, or on the attainment of a certain age, it does not carry interest until that time (*Tyrell v. Tyrell*, 4 Ves. 1), unless the bequest comes from a parent, or a person *in loco parentis*; in which case interest will be allowed from the death of the testator, if necessary for maintenance (2 Wh. & T. L. Ca. 259, 260).

(*a*) *Glasgow's Trs. v. Glasgow*, 30 Nov. 1830, 9 S. 87.

(*b*) *M'Allister's Trs. v. M'Allister*, 30 Nov. 1836, 15 S. 170; and see 15

S. 159. In England specific legatees are held entitled to dividends and interest from the time of the testator's death, although the legacies may have been directed to be paid within twelve months after the testator's decease (*Bristow v. Bristow*, 5 Beav. 289; 2 Rop. Leg. 4th Ed. 1250).

(*c*) *Paterson v. Macnaughten*, 14 Dec. 1838, 1 D. 241.

(*d*) *Gillespie v. Marshall*, 1802, M. "Accessorium," No. 2.

(*e*) *Campbell v. Reid*, 12 June 1840, 2 D. 1084; *Ogilvie v. Cumming*, *infra*; *Wilson v. Niblie*, 13 Jan. 1825, 3 S. 430.

(*f*) *Ogilvie v. Cumming*, 27 Jan. 1852, 14 D. 363; and see *Hardman v. Guthrie*, 1 June 1828, 6 S. 920.

to carry the intermediate rents of the lands for behoof of such heir when he should exist (a).

In other cases of postponed distribution, it would rather seem that, unless the main object of the testator, in requiring his trustees to retain the capital, is the benefit of the legatee himself, as in cases of minority and insanity, the interest must be accumulated, and paid over to the residuary legatees. In two recent cases, in which this doctrine was impliedly laid down, the argument on the other side was, that the omission to provide for the disposal of the interest of a fund created a lapse, to the benefit of which the heirs-at-law would be entitled. But the Court decided that undisposed-of profits were carried by a residuary clause (b). The subsistence of a life-rent of the estate out of which a legacy was made payable, would, in the absence of express direction, deprive the legatee of his right to interest during the currency of the life-rent, unless the legacy were expressly declared to be payable with interest (c).

In other cases of postponed distribution, unappropriated interest falls into residue.

As to the rate of interest payable to legatees, the rule of practice is, that no more is claimable out of the estate than the fund has actually yielded (d), unless the executor has resisted payment; in which case the claimant is entitled to decree for legal interest from the commencement of the proceedings (e). Under the old law of moveable succession, children claiming their mother's share of the goods in communion out of the general estate, were held not to be entitled to interest on their legal provisions prior to foris-familiation, or until such time as they were presumed to have compensated by their services the money expended on their clothing and maintenance (f).

Rate of interest payable on legacies.

(a) *Templer v. Templer*, 1 Apr. 1828, 3 W. & S. 47.

(b) *Pursell v. Newbigging*, 25 Nov. 1856, 19 D. 71; *Sturgis v. Campbell*, 19 June 1861, 23 D. 1128.

(c) *Grant v. Leith*, 31 Jan. 1811, F. C.

(d) See *M'Allister v. M'Innes*, 29 June 1827, 5 S. 862, where 4 per cent. was allowed on legacies from the period of one year after the testator's death; *Williamson v. Suttie*, 20 July 1843, 15 Jur. 637, where bank interest only was found to be due from the date of consignment in a process of competition in which the holder of the fund did not

take an active part; and *Menzies v. Livingston*, *infra*.

(e) See *Darling v. Adamson*, 16 May 1834, 12 S. 598; *Kelly v. Kelly*, 8 Mar. 1861, 23 D. 703; *Duff's Trs. v. Scripture Readers*, 19 Feb. 1862, 24 D. 452. The rate of interest allowed by the Court of Chancery is 4 per cent. (See *Sitwell v. Bernard*, 6 Ves. 543, and cases cited, 2 Wh. & T. 261.) Compound interest can only be claimed in virtue of a special direction to that effect in the will (*Arnold v. Arnold*, 2 My. & K. 365).

(f) *Menzies v. Livingston*, 27 Feb. 1839, 1 D. 601; *Steel's Trs. v. Cupar*,

Penal interest. In a former chapter we have dealt with the subject of the liability of trustees to penal interest; that is, to compound interest, or to simple interest at a rate higher than would have been exigible had they invested the trust funds properly, and observed the rules of a strict accounting (a).

II. Deductions and Abatements from Legacies.

Legacies postponed to debts.

A legacy may suffer diminution, either in consequence of the act of the settlor, as when he leaves a legacy of an heritable subject burdened with a debt or specific provision (b), or in consequence of the liability of the estate for the settlor's debts. Questions as to abatement occur either between the residuary estate and general and specific legatees, between heirs and executors, or between life-renters and fiars (c).

Does a direction to Trustees to pay debts relieve subjects on which debt is secured?

A general direction to pay the trustor's debts in a settlement of personal property, does not relieve the heir of a specific heritable subject from payment of a debt secured as a real burden upon the lands (d). The doctrine was extended in *Henderson v. Hamilton* (e), so as to exempt the beneficiaries under a general settlement of heritable and moveable estate from liability to pay off a debt secured on heritable subjects destined to the settlor's daughter by a marriage-contract, the principle being that the estate was destined *tantum et tale* as it then stood. In this case the debt had been charged on the estate before the execution of the marriage-contract; but even in the case of a bequest of a specific subject, which the testator afterwards burdens with debt or conveys in security, it is thought that, as the expressed intention is to give a legacy of the subject unburdened, the fact that the testator afterwards uses the subject as a fund of credit, ought not to defeat that intention, but that the debt should be paid out of the general estate. This view is to a certain extent borne out by the decision upon one of the numerous points raised

Specific bequest implies an intention to leave subject free from debt.

16 June 1830, 8 S. 926; *Dudgeon v. Arnot*, 19 Nov. 1830, 9 S. 36.

(a) Chapter XXIV. Section 2.

(b) *Frew v. Frew*, 15 Feb. 1828, 6 S. 554; and cases cited *infra*.

(c) We refer to the first chapter on the duties of trustees for a statement of the relative liabilities of heirs and executors (Chapter XVI. Section 3).

(d) *Carrick's Tr. v. More*, 11 June 1840, 2 D. 1068; *M'Nicol v. M'Nicol*, 31 Jan. 1816, F. C.; *Fraser v. Fraser*, 13 Nov. 1804, M. "Heir and Executor," No. 3; see *Johnston v. Cochrane*, 13 Jan. 1829, 7 S. 226.

(e) *Henderson v. Hamilton*, 29 Jan. 1858, 20 D. 473.

in the Breadalbane Trust case (a). The Marquis had directed his trustees to pay over the whole free rents of his unentailed lands to his daughters during their lifetime. He also bequeathed annuities to different persons, amounting in all to L.2000 per annum, but without making them real burdens on the estates. The trustees proposed to pay these annuities out of the rents of the unentailed lands, on the ground that rights having a *tractum futuri temporis* were chargeable against the heritable succession. But the Court ruled otherwise, on the ground, as stated by Lord Justice-Clerk Hope, that "the general administrators of the deceased's will, having his whole funds to meet all his obligations, cannot throw on the subject of this special bequest any particular burdens, on the ground that the heir or successor in heritable property might, in a question of intestacy, have had such relief" (b).

Of course, if a testator expressly direct a debt or legacy to be paid out of a particular fund, or burden the fund by a deed of a testamentary nature, the fund in question will be chargeable with the payment without relief from the general estate. This was the principle of the cases of *Yeats*, *Fergus*, and other cases (c). In *Wallace v. Ritchie's Trs.* (d), where a settlor gave directions for the sale and distribution of his whole property, except two estates, which were settled upon his nephew and his issue, and afterwards provided his wife in an annuity of L.800, secured over one of these estates, and thereafter, by a codicil to his settlement, increased the annuity to L.1500, without expressly making it a burden on the heritable estate, the Court, looking to the testator's intention, found that the entire sum, and not merely the original L.800 a-year, should be laid upon the heritable estate.

Express direction to pay debt out of specific fund.

1. Subject to the observations we have made as to burdens, the rule is, that specific legacies do not suffer abatement until the general estate is exhausted (e). And a declaration that a specific

Specific legacies do not abate until other funds exhausted.

(a) *Breadalbane's Trs. v. Duchess of Buckingham*, 26 May 1842, 4 D. 1259, 1st point.

(b) 4 D. 1263.

(c) *Yeats' Trs. v. Yeats*, 5 June 1835, 1 S. & M'L. 795, affg. 10 S. 565; *Fergus v. Fergus*, 7 Feb. 1833, 11 S. 362; *Campbell v. Campbell*, 10

July 1817, Hume, 180; *Frew v. Frew*, *supra*.

(d) *Wallace v. Ritchie's Trs.*, 7 July 1846, 8 D. 1038.

(e) In the English case of *Page v. Leapingwell*, 18 Ves. 463, the principle was laid down by Sir W. Grant, that although a legacy was in form

legacy shall abate in a particular contingency, is to be strictly construed. Thus, where a trustor left a house to his niece, and certain other heritable estate to nephews, with a power in favour of one of them to take over the estate on condition of paying certain sums to the other beneficiaries, including a legacy of L.500 to the niece, and the nephew did not exercise the option of taking the entire estate, and the funds proved insufficient,—it was held that the niece was not entitled to claim the legacy of L.500 out of the estate bequeathed to the nephews, on the ground that her right to payment out of that estate did not arise except in the event of the house being taken over under the power. Further, as both provisions were of the nature of special legacies, it was held that the trustor's debts remaining after the exhaustion of the general estate must be allocated rateably upon both (a). But a legacy secured unconditionally upon subjects specifically destined, must be paid in full, notwithstanding that the subject has already suffered abatement in consequence of the insufficiency of the general funds (b).

General legacies do not abate until residue exhausted.

2. General legacies of definite amount are preferable to residuary interests; though in the event of a deficiency of assets, they are subject to abatement *pro rata* (c). A legacy for charitable

residuary, yet if the intention appeared to be to give it as a specific legacy, it should only suffer abatement with other specific legacies. The distinction is a very shadowy one. In a recent case, where a testator, having a power of appointment by will over L.7100 3¼ per cents., appointed L.5000 to A., L.500 to B., and the residue to C.; and the stock had become liable to the payment of his debts, Sir John Romilly, M.R., held that the principle of *Page v. Leapingwell* was inapplicable, and that the debts were chargeable in the first instance on the residue. In this case the amount of the bequest was uncertain, being dependent on the value of the stock when it came to be sold. But, added his Honour, if it had appeared that the testator thought he was dealing with the sum of L.7100 sterling, and he had divided it into

different proportions, the loss would then have fallen on all the persons interested in proportion to their shares, although the last portion were called the residue (*Petre v. Petre*, 14 Beav. 197).

(a) *Greig's Trs. v. Greig*, 6 June 1854, 16 D. 899. See *Dennistoun v. Dennistoun*, 12 Dec. 1821, 1 S. 206.

(b) *Fergus v. Fergus*, 7 Feb. 1833, 11 S. 362.

(c) Ersk. 3, 9, 11 & 12; Bell's Prin. § 1875. In England it is held that a demonstrative legacy, that is, a legacy secured on a particular fund, is entitled to the privileges of a specific legacy in regard to exemption from liability to abatement until other general legacies have been exhausted (*Roberts v. Pocock*, 4 Ves. 150; *Lambert v. Lambert*, 11 Ves. 607; *Aiton v. Aiton*, 1 Mor. 178).

uses has no preference over other legacies (a). A direction to trustees to employ the surplus of personal estate in the purchase of lands to be entailed on his heirs, is, in a question of ranking, merely a residuary destination (b). Such directions, moreover, are, as we have elsewhere seen, strictly construed; and so a direction to employ the produce of *future* acquisitions in the purchase of lands to be entailed, will not carry an estate already in the possession of or vested in the truster (c).

A testator may so frame his settlements as to confer a preference upon one or more general legatees at the expense of the rest. In addition to the annuity cases to be afterwards noticed, we may refer to *Currie v. Currie* (d), where a testatrix, believing that she had the power to dispose of L.3500,—L.1000 of which was secured to her by ante-nuptial contract, and the remainder by a post-nuptial settlement which the husband subsequently revoked, —gave the sum of L.1000 sterling to her daughter, to be at her own absolute disposal, and declared that the *remaining* sum of L.2500 sterling should remain invested for the *liferent* use alternately of the said daughter, and of her children in fee. The free fund being reduced to L.1000 in consequence of the revocation of the post-nuptial contract, the Court were of opinion that the intention was to give the first sum of L.1000 preferably, and directed the whole fund to be paid over to the daughter. Where trustees are directed to invest or set apart a sum of money in a particular way, or in particular stocks, the legatees are entitled to the benefit of an investment equal in value to what might have been obtained for the money at the truster's death (e).

Testator may confer a preference on one general Legatee.

3. The ranking of usufructuary interests falls to be determined on similar principles to that of legacies of capital. Thus, where a testator settled a jointure upon his widow, and divided the residue of his heritable estate into shares, certain of which were to be *liferented* by his daughters, the sons' shares to be paid absolutely, it

How debts affect the interests of Liferenters.

(a) *Monro v. Scott's Exrs.*, 1630, M. 8048.

(b) *Hamilton v. Bennett*, 16 Aug. 1833, 6 W. & S. 533, affg. 10 S. 330.

(c) *Allan v. Glasgow's Trs.*, 1 Sept. 1835, 2 S. & M'L. 233. See Chapter XVIII. Section 1.

(d) *Currie v. Currie*, 22 Jan. 1835, 13 S. 290. See the English cases cited in 2 Wh. & T. L. Ca. 256.

(e) *Horsbrugh v. Horsbrugh*, 1 Mar. 1848, 10 D. 824; *Gray v. Gray*, 4 June 1835, 13 S. 866; and cases cited *supra*, p. 337.

was ruled that the interest of the heritable debt, and also the widow's jointure, were to be paid by the trustees, so as to affect the provisions of the sons and daughters rateably (a).

Annuitants
preferable to
Liferenters of
residue.

Where a fund is settled upon one person in liferent, with remainder to others in fee, annuities of definite amount form a deduction from the liferent; in other words, the liferenter is not entitled to encroach upon the capital for the purpose of obtaining repayment of the termly annuities (b).

Whether
Annuitant
entitled to be
paid out
of capital
when annual
revenues in-
sufficient.

In the case of an annuity being charged upon the residuary estate, if the residue should eventually prove insufficient to yield the annuity in the ordinary way of investment at interest, the question arises, whether the annuitant is entitled to have the capital sunk, so as to obtain an annual return, during the subsistence of the liferent, equal to what was bequeathed. We have seen that a legacy of interest, in the absence of any destination of the fee, may in certain cases be equivalent to a bequest of the capital (c). *A fortiori*, if there be no destination of the reversion, the annuitant would seem to be entitled, in case of a deficiency of funds, to sink the capital, so as to obtain the full amount of his annuity; and it has been so held in a case where there was no specific appropriation of the capital of the annuity fund, but merely a general residuary destination applicable to the entire estate (d).

Casamaijor
v. Pearson.

On the other hand, in *Casamaijor v. Pearson* (e), where certain annuities were charged upon property, with a proviso that, in the event of the residue not being sufficient for yielding the annuities in full, the money should be invested, and the dividends divided among the annuitants in rateable proportions, it was held by the House of Lords that each termly payment of the respective annuities formed a burden upon the revenue of that year alone; that the loss resulting from a deficiency in any one year fell upon the annuitants rateably; and that the surplus in other years belonged to the residuary legatees.

(a) *Dennistoun v. Dennistoun*, 12 Dec. 1821, 1 S. 206.

(b) *Currie v. Threshie*, 4 July 1846, 8 D. 1021; and see *Nixon v. Borthwick*, 18 Feb. 1806, F. C.; M. "Liferenter," No. 2.

(c) See p. 224, *supra*.

(d) *Berry's Trs. v. Cox's Trs.*, 18 June 1850, 12 D. 1037; *Miller's Trs. v. Miller*, 23 Feb. 1848, 10 D. 766, 4th point.

(e) *Casamaijor v. Pearson*, 29 April 1841, 2 Rob. 217; see 2 D. 1020.

It is of course to be understood that legacies, in whatever form provided, are postponed to the claims of onerous creditors. In one case, where the testator had died solvent, and his son thereafter took infetment upon a portion of his estate in security of his provisions, and in consequence of a subsequent depreciation in the value of property the estate was insufficient for the liquidation of the claims of creditors, the Court held that the son was entitled to the benefit of his security notwithstanding (a); but this decision was expressly overruled in *Bruce v. Bruce* (b), where the circumstances were similar. It is clear that, although a conveyance has been actually made to a gratuitous beneficiary in terms of the truster's direction, onerous creditors are entitled to follow the estate into his hands, on the principle that he represents the truster.

In event of a subsequent depreciation of estate, Creditors may claim funds paid to Legatees.

Legacies are also subject to deduction in respect of legacy and succession duty, under various statutes; for an exposition of which we must refer to works treating specially of such subjects (c). Most of the cases upon the question, whether the succession is to be treated as heritable or moveable, are cited in the chapter on Con-

Legacy and Succession Duties.

(a) *Remington & Co. v. Bruce*, 9 Dec. 1829, 8 S. 215.

(b) *Bruce v. Bruce*, 9 June 1831, 9 S. 695.

(c) The statutes now in force which authorize the imposition of legacy duty on personal estate, are the 55 Geo. III. c. 184; 8 & 9 Vict. c. 76; and 16 & 17 Vict. c. 51. By 5 & 6 Vict. c. 82 (made perpetual by 16 & 17 Vict. c. 59) these duties were assimilated as between Great Britain and Ireland. By 16 & 17 Vict. c. 51, duties were for the first time granted to the Crown, upon the succession in real and heritable property, according to a scale based upon the principle that duty is only to be paid upon the life interest. See the recent cases of *Hill*, 19 Mar. 1862, 24 D. 808, and *M'Donald*, 28 May 1862.

Duties are also chargeable upon the inventories of personal estate under 48 Geo. III. 149, and 55 Geo. III. c. 184, amended by 56 Geo. III. c. 107. See also the provisions of the Confirmation Act, 4 Geo. IV. c. 98. Some

material alterations were made as to the collection of, and liability for, inventory duty by two Acts of the 23d & 24th Victoria. By chapter 15, § 6, money secured on heritable property in Scotland, and money secured by bonds in favour of heirs and assignees, excluding executors, are declared to be moveable property in a question as to the incidence of inventory duty. By chapter 80, the duty on inventories is made a stamp duty; provision is made for its collection under the Stamp Acts; and the tax is made applicable, as before, to bonds, and also to money secured on heritable property by *ex facie* absolute conveyance or adjudication. Probate and inventory duty is payable upon all property situated within the kingdom, without regard to the domicile of the deceased; legacy duty is payable according to the law of the domicile, and into the Exchequer of the State in which the deceased person was domiciled (*Thomson v. Adv.-Gen.*, 18 Feb. 1845, 4 Bell, 1).

structive Conversion. As to questions of relationship, where the rate of the duty differs according to the degree, it has been held that joint legatees pay each upon their own share, according to the rates respectively applicable (*a*). The purchaser of an annuity is liable for unpaid and future instalments of duty (*b*). A testator may exempt his legatees from payment of legacy duty (*c*); in which case the exemption extends to the right of a conditional institute (*d*). The word "free," prefixed to a bequest, *e.g.*, "a free yearly annuity of L.60," is sufficient to lay the burden of legacy duty upon the general estate (*e*). Bequests of sums below the value of L.20 are exempt from legacy duty, and the exemption extends to several distinct legacies to different charitable or benevolent schemes under the same management (*f*). On the construction of the Income Tax Acts, it has been held that a testator cannot relieve his annuitants from payment of income tax by laying the burden on the general estate. The duty is payable, notwithstanding, out of the annuity (*g*).

SECTION IV.

CONDITIONS IN LEGACIES.

Conditions
precedent and
subsequent.

Conditions, when distinguished according to their mode of operation, are either precedent or subsequent; that is, the vesting of the estate is either made contingent on the determination of an event in the legatee's favour, or the legatee is divested by the occurrence of an unfavourable event. Conditions subsequent are more strictly construed than conditions precedent; because public policy, if it does not forbid, is unfavourable to the imposition of conditions, the effect of which is to deprive a grantee of a vested interest (*h*).

(*a*) See *Attorney-Gen. v. Bachus*, 11 Pr. Ex. 547.

(*b*) *Nisbet's Trs. v. Learmonth*, 19 Nov. 1845, 8 D. 69.

(*c*) See *Fischer v. Earl of Seafeld*, 18 Nov. 1825, 4 S. 192.

(*d*) See *Charteris v. Young*, 2 Russ. Ch. Ca. 183.

(*e*) *Bullock v. Beaton*, 8 Feb. 1853, 15 D. 373, where the English cases

upon similar expressions are explained in Lord Rutherford's note.

(*f*) *Stewart's Trs. v. Adv.-Genl.*, 11 July 1857, 20 D. 453.

(*g*) *Robson v. M'Nish*, 2 Feb. 1861, 23 D. 429; *Blair v. Allan*, 17 Nov. 1858, 21 D. 15; *Wall v. Wall*, 15 Sim. 513; 16 L. J. Ch. 305.

(*h*) See Bell's Pr. § 50; Jarman on Wills, Chapter xxvii. (3d Ed. II. 1).

Again, conditions have been classified, with relation to their object, into potestative and casual (a). A potestative condition makes the gift dependent on an act, the performance of which is within the power of the legatee; and the object of such conditions is to secure performance (b). Potestative conditions, accordingly, become obligatory on the legatee by acceptance of the grant; a principle which has been treated by some writers as an extension of the doctrine of approbate and reprobate. Casual conditions are those which are determined by the occurrence of an event, such as the death of a liferenter, the attainment of majority, the succession to another estate, etc. Such conditions, when not dictated by pure caprice, usually bear relation to some change in the circumstances of the legatee, or of some other party to whom a prior interest in the same subject has been limited.

Conditions
potestative or
casual.

Lastly, conditions are distinguished in relation to their obligatory character. A condition which is lawful and possible is obligatory; the effect of conditions which are either unlawful or impossible of fulfilment, remains for consideration.

Conditions
obligatory or
unlawful.

In addition to the recognised grounds of distinction which we have noticed, it is necessary to keep in view the distinction, in regard to potestative conditions, between imperative and prohibitory. An imperative condition is generally binding, unless the act enjoined is contrary to law. A prohibitory condition may be inoperative in law, on the ground of its having a tendency (1) to interfere with the personal liberty of the legatee, or (2) to alter or interfere with the rights of property; although the fulfilment of the condition, if it had sprung from the spontaneous act of the legatee, might have been harmless, or even laudable. A prohibitory condition is sometimes disguised in the form of an imperative one; and some of the confusion which pervades this branch of the law is perhaps attributable to the tendency of lawyers, to look rather to the form than to the substance of the injunction. Take, for example, a condition that the legatee is to reside in a certain place. Discarding the form of the direction, this is obviously prohibitory; for residence

Potestative
conditions
divided into
imperative and
prohibitory.

(a) Bell's Pr. and Jarman, ut supra. be taken bound to pay the grantor's debts, as in *Moncreiff v. Skene*, 29 June 1825, 1 W. & S. 672; *Bruce's Trs. v. Hamilton*, 29 Jan. 1858, 20 D. 473.

(b) For example, a legacy may be burdened with debt, or the legatee may

somewhere being a necessary condition of existence, the direction to reside in one place is of course equivalent to a prohibition against residing elsewhere. So an injunction to marry a particular person is in effect a condition in restraint of marriage (a).

Practical
division of
the subject.

The questions that occur in practice in relation to conditions may be divided into three classes: *first*, where the question is, whether the testator meant to impose a condition, or merely contemplated and provided for the occurrence of an event; in other words, whether the vesting of the legacy depends upon the condition; *secondly*, when the legatee is entitled to take the bequest free from the condition; *thirdly*, in what manner the condition may be purified or performed.

Whether the
vesting of a
legacy depends
upon the con-
dition.

1. On referring to our introductory observations, it will be seen that proper questions of vesting can only arise with reference to *casual* conditions; that is, conditions which are determined by an event, and not by the will of the legatee. A potestative injunction is, in the intention of the testator, necessarily a condition affecting the acquisition of a vested interest. But a legacy given upon a particular event may not be so. If, for example, a legacy is made payable upon the occurrence of an event which must happen, although uncertain as to time, the interest of the legatee vests *a morte testatoris*, though the period of payment is postponed; and the interest may accordingly be assigned or attached by legal diligence. If, on the other hand, it is uncertain that the event contemplated by the testator ever will happen, the event is regarded as a condition—*dies incertus pro conditione habetur*. The only certain events are the elapse of definite intervals of time, and death. Among uncertain events or contingencies which occasion a postponement of vesting, there are four of chief importance,—the attainment of majority; marriage; the birth of children; and the condition of survivance of a certain event. The condition of survivance is implied in a legacy when it is given to two or more persons jointly, or in succession, on the principle that the testator intends that the entire interest shall pass to the institute, or surviving legatee, in the event of the other legatee predeceasing the term of payment. The subject of vesting, with reference to the contingent events here specified, will be fully considered in subsequent chap-

Eventual con-
ditions.

Distinction be-
tween events
certain and
uncertain.

(a) See the cases on residence, *infra*, p. 239.

ters (a). We shall now allude only to some questions involving the application of the principles of vesting to conditions of an unusual or exceptional character.

The subject of legacies to trustees and executors has been considered in a previous chapter (b). Where the legacy is given to the trustee or executor in that character, his acceptance of the office is a condition affecting his right to the bequest.

Legacies to Trustees.

A frequent condition in settlements, whether of real or personal estate, is, that the gift shall only take effect in the event of the legatee not succeeding to certain other estates, or to property of a certain value (c). Such stipulations are effectual, though expressed in the form of conditions subsequent, with a destination over, provided there is a clear purpose of substitution,—subject, however, to the operation of the rules of law restrictive of substitutions (d).

Conditions relating to succession to other estate.

The case of legacies contingent on the legatee's survivorship of a definite period of time, is exemplified by *Wilkie v. Wilkie*. The testator had directed his trustees to retain his lands of Auchleshie in their management for fourteen years after his decease, and thereafter to sell the lands, and to divide the produce among all his children then in life, or their issue, the shares of predeceasing children to accresce to the survivors. One of the sons died whilst the sale was in progress; and the Court found that no share of the price or value of the lands could be held to have vested in the son at the time of his death, but that his share accresced, in terms of the trust deed, to the surviving children (e). The same principle is illustrated by another case, in which a right of survivorship was given in the event of any of the beneficiaries dying before the period of division (f).

Condition of survivorship illustrated.

Where a legacy is left to a party on condition of his appearing to claim it within a certain time, failing which, to other parties, the legacy will vest in the eventual legatees on the expiration of the

Condition, that the legacy is claimed.

(a) Chapters XLIII. and XLIV.

(b) *Supra*, I. 258.

(c) See *Ewing v. Ewing's Trs.*, 12 June 1857, 19 D. 835; *affd.* 22 D. Ap. Ca. 5; *Cunningham v. Cunningham*, 6 July 1858, 20 D. 1214; *Erskine v. Williams*, 14 Dec. 1843, 6 D. 226; *Lawson v. Imrie*, 10 June 1841, 3 D. 1001.

(d) As to which, see Chapters XXXVII. and XLIII.

(e) *Wilkie v. Wilkie*, 27 Jan. 1837, 15 S. 431; and see *Earl of Lauderdale v. Royle's Executor*, 19 May 1830, 8 S. 771.

(f) *Thorburn v. Thorburn*, 16 Feb. 1836, 14 S. 485.

Arbitrary
conditions.

time limited (a); and it follows, by parity of reasoning, that the vesting of a provision contingent on marriage, upon success in a suit, or any other arbitrary but lawful condition, will only take effect upon the condition being purified (b). A legacy having been given to a parent upon the singular condition of his having two children living at any time, the condition was held not to be purified by the birth of a second child, which lived only three-quarters of an hour, and had not been heard to cry (c). In the case of a legacy, the amount of which is left to the discretion of trustees, the exercise of the power is regarded as conditional; and, accordingly, the legacy will lapse by the death of the trustee, if he has neglected to exercise it (d). Professor Bell remarks, that where the condition *si sine liberis* is expressed, the mere birth of a child, irrespective of survival, will give a vested interest; a distinction which is correct in principle, though it is doubtful whether, in the actual decision of such cases, sufficient attention has been paid to the difference between express and implied conditions (e).

Conditions
depending
upon the birth
of children.

Where legacies have been given to the children of a family, or to a party failing issue of his body, and the circumstances were such as to render it improbable that additions would be made to the family, the Court has sometimes allowed payment to be made, in anticipation of the period of vesting, on security being found for repayment in the event of the succession opening to future issue (f). And it has been held, on the construction of a direction to convey a residue after fulfilment of trust purposes, to a party who was insane, in the event of his recovery, whom failing to another, that the trustees were entitled to denude in favour of the conditional institute on the arrival of the period of distribution, the party first instituted being still in a state of mental alienation (g).

Bequest to
lunatic on
restoration to
sanity.

(a) *Stevenson v. Macintyre*, 30 June 1826, 4 S. 776; *Neilson v. Coulter*, 1710, 4 Br. Supp. 807.

(b) See *Hunter v. Nicolson*, 29 Nov. 1836, 15 S. 159; *Scot v. Seton*, 1708, M. 2998.

(c) *Robertson v. Robertson*, 22 Jan. 1833, 11 S. 297; a most indefensible extension of a vicious rule of evidence.

(d) *Burnside v. Smith*, 10 June 1829, 7 S. 735.

(e) Compare Bell's Prin. § 1782, with the cases cited *infra*, Chapter XLIII. See also *Glendinning v. Walker*, 30 Nov. 1825, 4 S. 237.

(f) *Scheniman v. Wilson*, 25 June 1828, 6 S. 1019; *Blackwood v. Blackwood's Trs.*, 11 June 1833, 11 S. 699. Compare these cases with *Biggar's Trs. v. Biggar*, 17 Nov. 1858, 21 D. 4.

(g) *Dron's Trs. v. Peddie*, 5 Mar. 1850, 12 D. 825.

2 and 3. We proceed to notice, but very briefly, the subject of unlawful and impossible conditions, involving the question, in what circumstances a legatee is entitled to take the bequest free from a potestative condition. On this last point our law stands clear of one element of complexity which has entered into that of England (a), in consequence of the Courts of law having adopted the principle that a devise of real property upon an impossible or unlawful condition is void,—while the Courts of equity, in the adjudication of questions of personal succession at least, have adhered to the maxim of the civil law, according to which such conditions are held *pro non scriptis*. In the jurisprudence of Scotland, it is a universal rule, that a bequest, or voluntary provision, coupled with an unlawful or impossible condition, is effectual (b).

Unlawful and impossible conditions. Potestative condition, how far binding.

The bequest is effectual although the condition is unlawful or impossible.

Distinction between unlawful purpose and unlawful condition.

Legacies and bequests may be said to be unlawful, either when they are granted for an unlawful purpose, or when granted upon conditions which the law will not enforce. The subject of unlawful purposes has been considered in a previous chapter, in conjunction with that of conditions which are void, as interfering unduly with the right of property (c). As for conditions in restraint of personal liberty, these are seldom found in modern settlements. Two examples have attracted the especial notice of authors—restraints on residence, and restraints on marriage.

There are two reported cases on conditions as to residence. In the first, *Reid v. Coates* (d), the legacy was given by an uncle, coupled with the condition that the legatee should not reside with his mother. The Court, before deciding the question, inquired whether the legatee intended to observe the condition of separate residence; and having received an answer amounting to a *non repugnantia*, they refused to interfere, as it was not unlawful for the legatee to fulfil the condition. In the subsequent case of *Fraser v. Rose* (e), the Court seems to have gone further, and to have held the condition of non-residence with the legatee's mother, she being of good character, altogether nugatory; and the doctrine, that a degrading or contumelious condition may be disregarded, commends

Conditions requiring or prohibiting residence.

Fraser v. Rose

(a) Jarman on Wills, II. 9, 13 *et seq.*

(b) See Bell's Pr. § 1785; Ersk. 3, 3, 85; Stair, 1, 3, 7.

(c) Chapter VI. (I. 107). See Jarman on Wills, II. 17 (Repugnancy).

(d) *Reid v. Coates*, 5 Mar. 1813,

F. C.

(e) *Fraser v. Rose*, 18 July 1849,

11 D. 1467.

itself to reason. We incline to think that a condition enjoining residence in a particular place is lawful, on the principle that the testator may desire his representative to keep up a connection with the locality of his choice, and that the condition is sufficiently complied with, by having a home or place of residence in the locality, and occasionally visiting it (a). As to restraints on residence with the legatee's parents or near relatives, the case of *Fraser v. Rose* proves that the Court will not enforce the condition without inquiring into its reasonableness. If, therefore, the condition be capricious or unreasonable, it may safely be disregarded.

Conditions
in restraint
of marriage,
within what
limits effec-
tual.

Restraints on marriage are clearly illegal and inoperative when they are, either in form or virtually, equivalent to total prohibition (b). It may be added, on the authority of the English decisions on wills, that a restriction of the legatee's choice to a particular person, or to members of a particular class or profession, is void, as having a tendency to absolute prohibition (c); but it is not clear that the exclusion of a particular person or class of persons (d) would be objectionable. Conditions as regards time are only valid when coupled with a dispensing power; *e.g.*, when it is provided that the legatee shall not marry in minority without the consent of guardians or trustees (e). And conversely, conditions involving the requirement of consent, seem only to be binding when bearing relation to the period of legal minority, or such reasonable period of less-age as the testator may appoint. A provision to a wife, upon condition *si vidua manserit et non nupserit*, would seem to be lawful (f); and

(a) A donor may, of course, make it a condition of a provision, that the donee is no longer to reside with him; see *Patersons v. Paterson*, 26 Jan. 1849, 11 D. 441. As to residence, see Jarman on Wills, II. 51; and case of *Fillingham v. Bromley*, T. & R. 530, where Lord Eldon compelled a purchaser to take a title, although the vendor's right was clogged with the condition of residence. See also *Stones v. Parker*, 29 L. J. Ch. 874.

(b) See the cases collected in Br. Syn. I. 458; Jarman on Wills, II. 39.

(c) See *M'Rath v. Alexander*, 1712, M. 2975.

(d) Compare *Douglas v. Douglas*, 1792, M. 2985, where the judgment of the Court of Session, rejecting the condition, was reversed, with *Kelly v. Monck*, 3 Ridg. P. C. 205, where a condition not to marry a man who was not seised of an estate in fee, or of perpetual freehold, of the annual value of L.500, was held to be too general, and therefore illegal.

(e) See *Buchanan v. Buchanan*, 1680, M. 2968; Br. Sup. III. 335; *Fetterneer v. Semple*, 1680, M. 2969.

(f) *Foulis v. Gilmour*, 1672, M. 2965; Br. Sup. II. 160.

in practice it is not uncommon to restrict a widow's provision in the event of a second marriage.

In the interpretation of conditions as to marriage with consent of trustees, two principles have been established in favour of the legatee: first, that the trustees cannot refuse their consent except upon reasonable grounds; and secondly, that it is not necessary that the consent should be declared, it being sufficient that the trustees do not object to the marriage (a). As a necessary consequence of the first of these propositions, it follows, that if the trustees withhold the required consent capriciously, the legatee is free to marry without it, and by so doing will not forfeit the legacy (b). Our second proposition is illustrated by the recent case of *Wellwood's Trustees*. The truster had directed his trustees to entail and secure his lands of Foleyhill upon his granddaughter, Miss Boswell, and certain substitutes, with a proviso, that in the event of her marrying without the approbation of his trustees first had and obtained, her right and interest in the said lands should immediately cease and determine, fortified by a resolute clause. Miss Boswell married in minority, without the knowledge of the trustees. In a multiplepointing, brought for the purpose of ascertaining on whom the estate ought to be settled, the Court, on the suggestion of Lord Fullerton, required the trustees to state whether they were now willing to give their consent and approbation of the marriage. The trustees having given their consent by a minute, the

Conditions
requiring the
consent of
Guardians or
Trustees.

(a) *M'Kenzie v. Kinminity's Cr.*, 1750, M. 2977, 6592; Elch. Prov. to Heirs, No. 18. See on this point, Jarman on Wills, II. 48.

(b) *Bunten v. Buchanan*, 1710, M. 2972; *Pringle v. Pringle*, 1688, M. 2972; Br. Sup. II. 126; *Dalziel v. Scotstarvet*, 1688, M. 2971; *Gordon v. Petrie*, 1682, 3 Br. Sup. 433; *Foord v. Foord*, 1682, M. 2970. On the authority of Jarman (II. 46), it may be added, that the Court of Chancery is also extremely liberal in construing expressions of consent, and it will presume consent from the absence of dissent, agreeably to the maxim, *qui tacet consentire videtur* (*Mesgrett v. Mesgrett*, 2 Vern. 580; *Daley v. Desbouverie*, 2

Atk. 261; *D'Aguilar v. Drinkwater*, 2 V. & B. 225). In *Pollock v. Coft*, 1 Mer. 181, where, under the circumstances, consent was not required to be in writing, a general permission to the legatee to marry according to her discretion appears to have been deemed sufficient, without any further consent. And in *Strange v. Smith*, Amb. 263, Lord Hardwicke held that a mother, whose consent *in writing* was required, had, by making the offer to, and permitting the addresses of the intended husband, given consent to her daughter's marriage which she could not retract, though no written consent had been given, as required by the settlement.

Court held that the wish of the testator had been sufficiently complied with (a).

In terrorem
doctrine.

In England, conditions in restraint of marriage have been held void, as being *in terrorem* merely (b), when the will contained no destination over in default. This element has not been much considered in the decisions of the Court of Session.

(a) *Wellwood's Trs v. Boswell*, 21 June 1851, 13 D. 1211. The death of the party whose consent is required will, by rendering fulfilment of the condition impossible, enable the legatee to take the bequest unconditionally (*Grant v. Dyer*, 8 Dec. 1813, 2 Dow, 73). Where a father granted a bond of provision to his daughter, supposing her to be unmarried, to be null if she

married without his consent, and having afterwards learned that she was married, he expressed his dissatisfaction, but received her into his family, the Court held that the provision was not exigible (*Hay v. Wood*, 1781, M. 2982; Hailes, 864).

(b) See Jarman on Wills, II. 40 *et seq.*

CHAPTER XXXVII.

OF INTERESTS GIVEN TO A PLURALITY OF PERSONS JOINTLY OR IN SUCCESSION.

SECTION I.

CONDITIONAL INSTITUTION AND SUBSTITUTION.

A LEGATEE is said to be conditionally instituted when a legacy is given over to him in case the right should not vest in the prior legatee; he is said to be substituted when his interest is postponed to that of the prior legatee,—*i.e.*, when it is intended that he should succeed to the interest of the prior legatee, in the event of the latter dying without altering the destination. A destination in terms sufficiently comprehensive to import a proper substitution also implies a conditional institution, as the lesser right (*a*). If, therefore, an institute die without having acquired a vested interest, the person substituted takes the succession, not as a substitute, but in the character of a conditional institute; and he is not required to serve heir to the institute (*b*).

Conditional institution and substitution distinguished.

In destinations of heritable subjects, substitution presumed;

We have already seen (*c*) that a substitution, although binding upon trustees, is not binding upon the beneficiary, if he choose to alter it; which he may do by disposing of the property either for onerous causes or by way of settlement, or, in the case of a fund subject to a substitution,—by changing the securities (*d*).

in moveables, conditional institution.

Defeasance of substitutions.

(*a*) *Fyffe v. Fyffe*, 13 July 1841, 3 D. 1205; *Aitchison v. Allan*, 16 Feb. 1831, 9 S. 454.

(*b*) *Fogo v. Fogo*, 18 Aug. 1843, 2 Bell, 195.

(*c*) *Supra*, I. 98-102

(*d*) *Ersk.* 3, 8, 44; *Brown v. Coventry*, 1792, M. 14863; Bell, 8vo Ca. 310; *Greig v. Johnstone*, 1 July 1833, 6 W. & S. 426; *M'Dowall v. M'Gill*, 19 June 1847, 9 D. 1284; *Baine v. Craig*, 8 June 1845, 7 D. 845.

Substitution
may be de-
feated by a
prior will.

In *Fyffe v. Fyffe* we have an example of the defeasance of a substitution by the act of the institute in a manner not contemplated by the settlor. The bequest was made, in the first place, to an insane person, and, in the event of his death, it was "to fall and belong" to two persons who were entrusted with the management of the fund during his lifetime. The institute never recovered the use of his faculties; but it so happened that he had executed a testament before he became insane, and, of course, before the legacy had vested in him. The Court held that this testament was sufficient to defeat the substitution, although, in consequence of the legatee's state of mind, he never could have entertained any rational intention of defeating it (a).

"Whom fail-
ing," in herit-
able destina-
tions, imports
substitution.

With respect to the question, what terms import a *substitution*, the first point that claims our attention is the distinction as to destinations of heritable and moveable subjects. The words "whom failing," occurring in a direct conveyance of heritage, had from a very early period acquired a fixed signification, as denoting an intention to create a proper substitution (b). These, accordingly, are the words of destination invariably used in deeds of entail. The absence of fetters, and even of prohibitory clauses, however much these may affect the institute's power of defeating the substitution, cannot alter the meaning of the words of destination, "whom failing," which naturally import a substitution after, as well as anterior to, the period of vesting. A direction to trustees to convey heritage "to A., whom failing, to B.," will of course receive the same construction as if those words had occurred in a direct conveyance to the beneficiaries; and this construction was extended, in the case of *Ramsay v. Ramsay* (c), to a trust directing the execution of a conveyance of the universitas of the settlor's estate, which consisted to a considerable extent of heritable property. The same question was again raised, but not decided, in the case of the *Queen's Remembrancer v. Dougall* (d), where trustees were directed to realize *moveable* property, and to invest the proceeds in the purchase of land or in heritable security for behoof of his daughter and the

(a) *Fyffe v. Fyffe*, 13 July 1841, 3 D. 1205. *Ogilvie v. Erskine*, 26 May 1837, 15 S. 1027; and cases in Br. Syn. p. 2328.

(b) See *Fogo v. Fogo*, *ut supra*.

(c) 23 Nov. 1838, 1 D. 83. See also

(d) 12 Feb. 1841, 3 D. 548.

heirs of her body, and failing them, to the testator's lawful heirs. Judging from the analogous cases of trusts for the execution of entails, we should infer that a direction to purchase lands, to be settled without prohibitory clauses on A., whom failing, to B., would be interpreted as a direction to create a proper substitution. A substitution in heritable succession may, of course, be created by other words indicative of the settlor's intention that the substitute should take, failing the institute after the period of vesting (a).

On the other hand, in settlements of moveable interests, whether in the form of a simple conveyance or of a trust deed with a direction to convey, the presumption is very strong against substitution (b). And the presumption is precisely similar in the case of destinations by marriage-contract (c).

Presumption against substitution in conveyances of moveable interests.

It is settled that the words "whom failing" import only a conditional institution (d); and although there may be room for differences of opinion as to the construction of the older cases, we believe that there is only one reliable formula for creating a substitution in moveable property, viz., "whom failing, either before or after the interest has vested," or words of equivalent meaning. Lord Brougham, it is true, observed, in the case of *Greig v. Johnston*, that it could not be said "that there is any technical form of expression which shall alone amount to a valid declaration of the intention of the party disposing of his property to exclude conditional institution, and to provide substitution" (e); but the intention to substitute must be expressed, and not left to implication.

Meaning of words, "whom failing," in moveable destinations.

Greig v. Johnston.

In *Ogilvie v. Cumming*, trustees were directed, after payment of debts and special provisions, to lay out and employ the residue of the estate for the use and behoof of the truster's grandson, and the heirs of his body, "in such way and manner as may seem most expedient to them, till he or they may arrive at majority, when they are to denude in his or their favours, with such conditions that they

Ogilvie v. Cumming.

Terms which held to import substitution in *mobiliis*.

(a) *Lawson v. Guthrie*, 10 June 1841, 3 D. 1001.

(b) *Greig v. Johnston*, 1 July 1833, 6 W. & S. 406, affirming 9 S. 806, where the older cases are cited; *Christie v. Christie*, 1681, M. 8197; *Campbell v. Campbell*, 1740, M. 14855; *Brown v. Coventry*, 1792, M. 14863. See also

Tait v. Lady Duncan, 11 July 1837, 15 S. 1273.

(c) *Henderson v. Hamilton*, 29 Jan. 1858, 20 D. 473.

(d) *Allan v. Fleming*, 20 June 1845, 7 D. 908; *Henderson v. Hamilton*, *supra*.

(e) 6 W. & S. 420.

shall not dispose of the same, nor alter the succession thereof, either gratuitously or onerously, as to the said trustees may seem proper;" failing which, the residue was to go to any other son that might be born to the truster's son, and the heirs of his body; "and failing of him without lawful issue, then such residue is to pertain to the daughters of the said Thomas Cumming, equally among them," etc. By a codicil it was declared, that in the event of the succession opening to heirs-female, the estate should pertain solely to the eldest and her issue. The succession opened to the grandson while in minority; and he having died major without calling upon the trustees to denude in his favour, his representatives claimed the succession, maintaining that the destination to heirs-female was merely a conditional institution, and was evacuated when the grandson attained majority. But the House of Lords, affirming the decision of the Court of Session, preferred the eldest heir-female of the truster's son to the succession, holding that, although a vested interest accrued to the grandson *a morte testatoris*, there was an effectual substitution in favour of the heirs-female, which remained in force until the succession was altered by the act of the institute (a). The same principle appears to have been recognised in an older case, where a father gave a right of survivorship to one of his children in the event of another child dying before majority or marriage; though it is doubtful whether this case ought not rather to be classed amongst those in which the vesting was postponed until majority or marriage (b).

Destination
over to "Heirs
and Assign-
ees."

Although the heirs of a legatee in whom no interest has vested, do not succeed to the inheritance in their character as representatives of the legatee, they may of course be conditionally instituted under a destination to A. and his heirs, or to heirs, executors, and assignees. A conditional institution of heirs may be made in any terms sufficiently expressive of the intention of the settlor to prefer the legal representatives of the beneficiary to his own representatives, as will appear from the following, among many other cases, in which a gift over to heirs or representatives of a legatee has received effect as a conditional institution.

(a) *Ogilvie v. Cumming*, 27 Jan. 1852, 14 D. 363; affirmed 15 July 1856, 19 D. Ap. Ca. 7.

(b) *Robertson v. Robertson*, 10 Dec. 1819, Hume, 273.

In *Inglis v. Miller* (a), and *Boston v. Horseburgh* (b), the destination was to "heirs, executors, or assignees;" in *Graham v. Hope* (c), *Sutties v. Suttie* (d), and *Torrie v. Munsie* (e), to "heirs and assignees;" in *Sutties v. Suttie* (f), to "heirs and assignees whatsoever;" and in *Lawsons v. Stewarts* (g), to "executors or next of kin." In all these cases, the destination was sustained as a conditional institution in favour of the *next of kin of the beneficiary or legatee*. In *Torrie's* case, the important doctrine was laid down, that the Crown was not comprehended in the destination to heirs where the legatee was a bastard; Lord Glenlee observing, that the gift of bastardy was in its inception different from that of *ultimus hæres*; for a bastard had, at common law, no heirs except the heirs of his body (h). In *Hunter v. Nisbet* (i), two unmarried sisters executed a mutual settlement conveying their whole heritable and moveable property to the longest liver in liferent, "and to the heirs of the longest liver in fee;" and this was followed by a destination over to heirs of a particular class. The Court held that the word "heirs" in the conditional institution must be construed, heirs of the body; because, unless the expression were so limited, the effect of the settlement would be to let in heirs whatsoever, to the exclusion of those specially favoured in the subsequent destination. In another case, a destination to "descendants" was found effectual to carry the legacy to the next of kin (being descendants) of certain legatees who predeceased the settlor (k). A declaration that the legacy shall be "held and enjoyed" by the beneficiary, his heirs and assignees, will receive effect as an implied trust for the benefit of the heirs in the event of the legatee's non-survival. (l). On the other hand, a mere power to the legatee to distribute the fund amongst his children does not import a conditional institution (m); unless there is a destination over in the event of failure to distribute.

Various forms
of conditional
institution of
Heirs.

(a) 1760, M. 8085. See also *Sym v. Gray*, 1751, Elchies, Test. No. 11; *Innes v. Innes*, 1670, M. 14880, 4272.
(b) 1781, M. 8099.
(c) 1807, M. Appx. Legacy, No. 3.
(d) 19 Jan. 1809, F.C.
(e) 31 May 1832, 10 S. 597.
(f) 19 Jan. 1809, F. C.
(g) 20 June 1827, 2 W. & S. 625.

(h) 10 D. 603.
(i) 14 Nov. 1839, 2 D. 16.
(k) *Thomson v. Cumberland*, 16 Nov. 1814, F. C.; and see *Tinnock v. M'Lewnan*, 26 Nov. 1817, F. C.
(l) *Earl of Moray v. Stewart*, 1782, M. 8103.
(m) *Scott v. Carfrae*, 1769, M. 8090.

Questions
between Heirs
and next of
kin.

The subject of destinations to heirs has been already considered in one of the introductory chapters, with more especial reference to the question, who is entitled to succeed, whether the heir-at-law, or the next of kin (a).

SECTION II.

EQUITABLE INTERESTS GIVEN JOINTLY OR IN SHARES.

Joint legacies
fall to be
divided *per*
capita.

When a legacy is given to a number of individuals without distinguishing their relative interests, it is clear that the rights of the legatees must be determined by the principle of equal division, or, as it is sometimes termed, division *per capita*. The circumstance that the testator has given pecuniary legacies of different values to his residuary legatees, is no ground for departing from the rule of equality in the distribution of the residue (b). Nor is the relationship of any of the legatees to the testator, or to one another, a reason for importing into the will a preference which the testator himself has not expressed; or for adopting a principle of division which violates the implied condition of equality. Accordingly, legacies to two or more families jointly (c), or to a family in conjunction with other persons individually named (d), fall to be divided *per capita*, and not *per stirpes*.

Heirs condi-
tionally insti-
tuted take *per*
stirpes.

On the other hand, where children succeed to their parents' share, either in virtue of the implied condition or of an express ulterior destination, the legacy falls to be divided *per stirpes*; for in that case the legacy has already, in the mind of the testator, been equally divided between the parties first instituted; and the meaning of the substitution is, that the children of each family receive precisely the same shares as those to which their parents would have been entitled had they survived. This is the principle of the case of *Thomson v. Cumberland* (e).

Survivorship
by express
conditional
institution.

Legatees of a common interest may be conditionally instituted

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| (a) Chapter VII. (I. p. 127). | (d) <i>M'Courtie v. Blackie</i> , 15 Jan. 1812, Hume, 270; <i>Grant v. Fyffe</i> , 22 May 1810, F.C.; <i>Renny v. Crosbie</i> , 8 Dec. 1822, 2 S. 60. |
| (b) <i>Pitcairn v. Thomson</i> , 8 June 1853, 15 D. 741. | (e) <i>Thomson v. Cumberland</i> , 16 Nov. 1814, F.C. |
| (c) <i>M'Kenzie v. Holte's Legatees</i> , 1781, M. 6602; <i>Bryden v. Bryden</i> , 22 Apr. 1833, 6 W. & S. 354. | |

to one another by way of survivorship. The survivor's right of accretion is of course indisputable, when he is substituted in express terms, as was laid down in *Aitchison v. Allan*, where the trust deed declared, that in the event of the death of any of the grantor's daughters before marriage or majority, her provision therein contained was to be equally divided among the surviving children. This was found to import a conditional institution in favour of the survivors to the share of a daughter who predeceased the testator, and not merely a substitution (a). The case of *Chalmers v. Chalmers* (b) raised a more difficult question. The father disposed *mortis causa* four different subjects, one to each of three children by a first marriage, and the fourth to two children of the second marriage, equally between them, all in liferent, with remainder in fee to the children of the liferenters respectively. There was a general proviso, "that in the event of the decease of any of my children without lawful issue, the share or shares of such deceiver or deceasers shall accresce and belong to the survivors or survivor of them equally in liferent, and to the lawful issue *per stirpes* in fee, but without prejudice to the former destinations." On the predecease without issue of one of the two children of the second marriage, to whom one of the subjects had been disposed, as already stated, in equal shares, the Court held that the survivor of these two was entitled to the entire subject *jure accrescendi*, to the exclusion of the children of the first marriage.

Under the doctrine of accretion, the right of survivorship is implied wherever a legacy is conceived in terms which, in the contemplation of law, amount to a *joint* destination. The use of the word "jointly" implies survivorship (c); and according to Prof. Bell, the addition of the word "severally" does not detract from the force of the joint bequest. Where the legacy is destined simply to two or more parties, without the addition of words importing

Doctrine of
accretion in
joint destina-
tions.
Survivorship.

(a) *Aitchison v. Allan*, 16 Feb. 1831, 9 S. 454; and see cases in Mor. Dict. "Implied Condition," p. 6344 *et seq.* Accordingly, in the more recent cases on survivorship noticed in treating of postponed vesting, which are very numerous, the only question raised was, as to whether the force of

the clause of survivorship extended to the period intermediate between the death of the testator and the term of distribution.

(b) *Chalmers v. Chalmers*, 22 May 1827, 5 S. 687.

(c) Stair, 3, 8, 37; Bell's Pr. § 1879.

either joinder or severance, it has been held, in conformity with the principles of the civil law, that the *jus accrescendi* was implied. Thus, a liferent to three daughters "during all the days of their lives respectively," was held to be total in the person of the surviving daughter; Lord Glenlee observing, that the legatees were conjunct *et re et verbis* (a). So also in a recent case, where there was a conveyance of a succession to several parties *in shares*, followed by a *simple* destination to the same parties as residuary legatees, the Lord J.-C. Inglis observed, that the latter destination would have the effect of preventing an intestacy in the event of the failure of any of the beneficiaries (b). It is still an open question, whether the *jus accrescendi* in joint legacies has the effect of a substitution, or of a conditional institution merely (c).

Whether joint destination has the force of a substitution.

Does the *jus accrescendi* embrace lapsed and forfeited interests?

It may be affirmed, on the authority of the *Breadalbane Trust* case (d), that where a joint destination is so expressed as to imply a substitution to the surviving donee, it will also operate as a conveyance of the entire subject to any of the donees who accept, in the event of the others declining the bequest or betaking themselves to their legal rights. The principle of accrescion, namely, that the testator prefers that either of the legatees should succeed rather than his heir-at-law, is obviously alike applicable whether the joint destination fail through non-acceptance or through non-survivorship. In the recent case of *Duff's Trs.* (e), the question was raised, whether accrescion could take place on a bequest to societies of a particular class in certain towns; some of these towns having no organization of the kind contemplated. But as the legacy was plainly a gift in severalty, it became unnecessary to decide the point.

The doctrine of accrescion does not extend to a bequest of equal shares.

Where a legacy is given to a plurality of persons *in shares* (whether of unequal or equal amount), the death of any of their number during the lifetime of the settlor will cause a lapse, as

(a) *Barber v. Findlater*, 6 Feb. 1835, 13 S. 423; and see *Tulloch v. Welsh*, 23 Nov. 1838, 1 D. 94, per Lord Moncreiff; *Breadalbane Trs. v. Lady E. Pringle*, 15 Jan. 1841, 3 D. 357, 364; *Burnett v. Burnett*, 4 Mar. 1854, 16 D. 780.

(b) *Alves v. Alves*, 8 Nov. 1861, 23 D. 712, 716.

(c) *Wright's Exrs. v. Robertson*, 20 Mar. 1855, 27 Jur. 341.

(d) *Breadalbane Trs. v. Pringle*, 15 Jan. 1841, 3 D. 357. Here the destination was held not to be joint; but the principle was recognised.

(e) *Duff's Trs. v. Society of Scripture Readers, etc.*, decided by Lord Jerviswoode, 24 D. 557, note.

to the share of the predeceasing legatee; for, although here the legatees are *formally* conjoined, the manifest intention is to give separate legacies to each out of a common fund. It was at one time a favourite topic of discussion with the civilians, whether the *jus accrescendi* did not extend to legacies in which the grantees were *conjuncti verbis tantum*, as well as to the case of legatees *conjuncti re et verbis*. Vinnius was of opinion that the right of accrescion had place in both cases (a). But ultimately the more limited application of this right, as expounded by Voet, was received; and this view of the case was adopted by Lord Stair, in the passage to which we have already referred, where a full discussion of the question will be found (b).

It is therefore a settled point in the law of Scotland, that the survivor of two legatees has not the benefit of accrescion where the bequest, although conceived in favour of a plurality of persons, is in substance a right to separate shares; as in the case of a legacy to certain persons "in equal shares," "equally and proportionally" (c); or "equally between" the legatees (d); or "to be equally divided" between them (e); or "equally betwixt them, share and share alike" (f); or in any other form denoting a severance of interests.

Examples of
bequests in
severalty.

SECTION III.

IMPLIED CONDITIONAL INSTITUTION OF THE CHILDREN OF BENEFICIARIES.

Where a legacy is given by a parent to a child or grandchild, or by a party to his collateral relatives as a class, without mention of heirs, there is a presumption that the testator has overlooked the contingency of the beneficiary's predecease, leaving issue; and that, if he had contemplated that event, he would have instituted the children in room of their parents. On this ground, equity holds the ulterior destination to be qualified by the implied condition, *si insti-*

Doctrine *si
institutus sine
liberis decesserit*
defined.

(a) Vinn. Inst. 2, 20, 16.

(b) Stair, 3, 8, 37.

(c) *Paterson v. Paterson*, 1741, M. 8070.

(d) *Breadalbane Trs. v. Pringle*,
15 Jan. 1841, 3 D. 357.

(e) *Rose v. Rose*, 1782, M. 8101.

(f) *Torrie v. Munsie*, 31 May 1832,
10 S. 597.

tutus sine liberis decesserit (a). The same condition applies to the eventual right of succession of the testator's heirs-at-law, failing a residuary clause or other ulterior destination (b). The presumption against the intentional exclusion of the testator's descendants, although not absolute, is very strong. In the case of collateral relatives it is weaker; and it will be seen that the extension of the benefit of the condition to collaterals is founded on the assumption that the collateral legatees are favoured on the ground of relationship, and as a family. An individual legatee in the collateral line is regarded as *persona prædilecta*, and his share does not transmit to his children, unless it has previously vested in himself.

Division of the subject;

The administration of this interesting branch of equitable jurisdiction has been marked by a greater consistency of opinion and decision than we shall find in the more intricate departments of the law of vesting; and an attentive consideration of the cases that have occurred during the present century, will enable the practitioner to determine with tolerable certainty whether the condition *si sine liberis* is, or is not, to be implied with reference to any destination likely to occur in practice. The questions that have arisen with reference to the implied institution of children may be classified under the following topics:—*First*, the degree of relationship subsisting between the settlor and the beneficiary; *secondly*, the construction of clauses of survivorship or destination over, as affecting (1.) the child's interest in the parent's share, or (2.) his interest in the share of a predeceasing co-legatee; and *thirdly*, how far the presumption of an implicit institution of children may be redargued by evidence of a contrary intention on the part of the settlor. In conclusion, we shall inquire whether the condition is operative in favour of children only, or of *issue* in a wider sense.

Involves questions as to effect of (1) Relationship; (2) Destination over; (3) Contrary evidence; (4) Meaning of the word "liberi."

I. *Relationship between the Settlor and the Grantee.*

Bequests to the Settlor's children as a class.

Provisions to children or grandchildren are presumed to spring from the *pietas paterna*, and are supposed to be intended for the benefit of the grantee's family. Equity accordingly implies in such

(a) See the texts of the civil law on which this doctrine is founded, viz., Cod. Lib. 6, Tit. 25, L. 6 (De Inst. et Subst.); Cod. Lib. 6, Tit. 42, L. 30

(De fideicom.); Dig. Lib. 35, Tit. 1, L. 102 (De Cond. et Demonstr.).

(b) Bell's Pr. §§ 1776, 1989; Ivory's Erskine, 825.

provisions an institution of descendants, whether the legatees named comprise the whole of the testator's existing issue or certain individuals only. The simplest case is that of a bequest of the testator's property to his children as a class : here there is no room for dispute as to the applicability of the condition, apart from intention, though the question may be raised, whether the exclusion of issue was not intentional (a).

The case of bequests to individual children of the settlor is equally free from dubiety. Thus in *Dixon v. Broun* (b), the testator left the residue of his succession, heritable and moveable, to his eldest son, who had a family at the date of the settlement; and the son having predeceased the testator, the Court sustained a claim on the part of his children to the entire residue, in preference to that of the testator's other children, to whom general legacies had been bequeathed. In *Wilkie v. Jackson* (c), provisions to the testator's daughters, which had been made burdens upon their brother's share of the succession, were held to be transmissible to the children of predeceasing daughters, although one of the sums was expressly destined to heirs and assignees, while the rest were not; thus proving, according to the argument of the defenders, that the contingency of a failure of immediate descendants had been within the contemplation of the testator. These two cases are direct authorities for the proposition, that a legacy or residuary bequest to a child is affected by the implied condition *si sine liberis*, although other children of the family have been dealt with upon a different footing.

Bequests to individual children of the Settlor.

The institution of grandchildren as testamentary heirs may have place either in the event of the failure of immediate descendants, or in consequence of the settlor having chosen to limit his children's interest to a life, with remainder to their issue in fee. In either of those cases, the interests of predeceasing grandchildren will transmit to their issue as conditional institutes—in virtue of the implied condition, *si sine liberis*—notwithstanding the addition of a destination over or clause of survivorship, and whether the interest consist of a share of the succession (d); of a joint uni-

Bequests to the Settlor's grandchildren as a class.

(a) *Mags. of Montrose v. Robertson*, 1738, M. 6398; *Rattray v. Blair*, 8 Dec. 1790, Hume, 526; *Booth v. Black*, 16 July 1832, 6 W. & S. 175, affirming 9 S. 406.

(b) 10 June 1836, 14 S. 938.

(c) 9 July 1836, 14 S. 1121.

(d) *Mowbray v. Scougall*, 9 July 1834, 12 S. 910.

versal legacy (a); or of a general legacy to all the children of one of the testator's sons (b).

Bequests to individual grandchildren.

It has not been expressly decided that the equitable condition in question will affect a legacy in favour of an individual grandchild, to the exclusion of his brothers and sisters; but if, as Lord Glenlee observed, in the case of *Hamilton v. Hamilton* (c), the application of the equitable condition to the case of grandchildren "is founded upon the obligation to provide for children and *descendants*," we are warranted in expressing the opinion, that the issue of a favoured grandchild is as much entitled to the benefit of the condition, as the issue of a child individually favoured.

Legacies to collateral relatives as a class, held to be given on the ground of relationship; and the condition applies.

With regard to collaterals, the rule seems to be that, in the case of a legacy being left to all the children of a family, the issue of any member of the family predeceasing the testator will be admitted to the succession as implied conditional institutes, in preference to the heirs-at-law (d). In *Christie v. Patersons* (e), where the succession was given to all the testator's cousins on the mother's side, without mention of heirs, the children of a predeceasing cousin were admitted as implied conditional institutes. The benefit of the implied institution had been previously extended to the case of a legacy to all the children of a nephew, in *Wallace v. Wallace* (f); and in the earlier case of *Mackenzie v. Holte's legatees* (g), to the children of several legatees who appear to have been collateral relatives of the testator.

Thomson's Trs. v. Robb.

In the case of *Thomson's Trs. v. Robb* (h), where the favoured legatees were all the nephews and nieces of the granter of a trust settlement, it was strenuously maintained that the doctrine of im-

(a) *Walker v. Park*, 20 Jan. 1859, 21 D. 286.

(b) *Robertson v. Houston*, 28 May 1858, 20 D. 989.

(c) *Hamilton v. Hamilton*, 8 Feb. 1838, 16 S. 478; see 487.

(d) See *contra*, *Wishart v. Grant*, 1763, M. 2310 (not authoritative).

(e) 5 July 1822, 1 S. 543; *Walker v. Walker*, 1744, M. 10328, 14858; Elch. Imp. Will, No. 5; cases of *Wallace* and *M'Kenzie*, *infra*.

(f) *Wallace v. Wallace*, 28 Jan. 1807, M. Appx. Clause, No. 6.

(g) *M'Kenzie v. Holte's Legatees*, 1781, M. 6602.

(h) 10 July 1851, 13 D. 1926. In *Thomson's Trs. v. Thomson*, decided Feb. 1862 by Lord Mackenzie, the bequest was "to the brothers and sisters of my deceased father and their lawful issue." All the testator's uncles and aunts and some of the cousins in the class described in the bequest being dead, Lord Mackenzie held that the descendants of the cousins were entitled to share the succession.

plied institution was inapplicable, by reason of the destination having been conceived in favour of two of the parties *nominatim*, while the others were described under the general designation of "the lawful children of the said Mrs Penelope Thomson or Young, whether of a first or of a second marriage, *alive at the time of my decease*." But the Court disregarded this specialty, and by a unanimous judgment gave the children of two predeceasing nieces the benefit of the condition; Lord Cuninghame observing, that the condition, *si hæres decesserit sine liberis*, had been liberally admitted in our practice, and that the case before them was stronger than the previous cases of *Mackenzie, Wallace, and Christie*.

On the other hand, it has been decided that a legacy to one sister among several (a), or to nephews and nieces called individually, to the exclusion of others in the same degree of relationship, is not capable of being affected by the implied condition *si hæres decesserit* (b); the presumption being, that the bequest is given to them as *personæ prædilectæ*,—a presumption which, of course, applies *a fortiori* to the case of a destination to strangers in blood or even to the testator's nearest heirs (c).

Where individual members of a family collaterally related are selected, the condition does not apply.

II. *Effect of Destination over, or clause of Survivorship.*

As early as the cases of *Binning v. Binning* (d) and *Wallace v. Wallace* (e), it appears to have been admitted that a clause in a joint bequest instituting the survivors in the room of predeceasing legatees, was qualified by the condition *si sine liberis*, to the extent of enabling the children of a predeceasing legatee to succeed at least to their parent's share. Subject to that limitation, the doctrine of implied institution has been adhered to throughout the later series of cases to which we are about to refer, including *Robertson v. Houston* (f), *Walker v. Park* (g), and *Richardson v. Donaldson's Trs.* (h).

It is settled, that when the deed contains a clause of survivorship applicable to the failure of the legatees specially named, or even to the failure of those legatees and their heirs, the issue of a

Right of Legatee's children is preferable to that of joint Legatees under a clause of survivorship.

Issue of deceased Legatee have not the benefit of a clause of survivorship, unless expressly included in it.

(a) *Fleming v. Martin*, 1798, M. 8111.

(b) *Hamilton v. Hamilton*, 8 Feb. 1838, 16 S. 478.

(c) *Black v. Valentine*, 17 Feb. 1844, 6 D. 689.

(d) 1767, M. 13047.

(e) M. "Clause," No. 6.

(f) 20 D. 989.

(g) 21 D. 286.

(h) *Richardson v. Donaldson's Trs.*, 14 Feb. 1862, House of Lords.

deceased legatee takes only the parent's original share ; for in this class of destinations it is justly considered, that as the testator has contemplated and provided for both events—that is, for the event of a legatee dying leaving issue, and also for the event of a legatee dying without issue—and in the former event has given the interest over to the issue, but in the latter, to the surviving original legatees only, the expressed intention of the testator must be the law of the settlement ; and implication is excluded. In the case of *Greig v. Malcolm*, Lord Jeffrey expressly rested his judgment upon the ground that the testator, at the time he made the substitution, had the contingent interests of children in view ; distinguishing it from the case where legatees are mutually substituted to each other without mention of heirs, in which case, he observed, it is presumed that the testator had not contemplated the event of the legatees leaving issue ; and therefore, if that event takes place, the issue come in along with the substitutes (a). In *Clelland v. Gray* (b), the destination was “to survivors equally, failing issue of the de-ceaser ;” and the Court seem to have relied upon this expression as indicating an intention on the part of the settlor, as regards lapsed shares, to prefer his surviving children to the succession, to the exclusion of grandchildren. But the question having been afterwards deliberately raised in the case of *Thornhill v. Macpherson* (c), where the settlement made no mention of heirs, but expressed a desire “that the whole of my property be equally divided amongst my children, with benefit of survivorship,” a majority of the Second Division of the Court were of opinion, contrary to the view of Lord Jeffrey and the Lord J.-C. Hope, that there was no *jus accrescendi* in the issue of a child who had predeceased the period of vesting ; and this decision was held binding in the subsequent cases of *Walker v. Park* and *Vines v. Hillou* (d).

*Young v.
Donaldson's
Trs.*

The question was finally settled by *Young v. Donaldson's Trustees* (e), where a residuary interest was given to several legatees and their respective heirs and assignees, with a destination over to

(a) *Greig v. Malcolm*, 5 Mar. 1835, 1860, 22 D. 1436. See also *Tulloch v. Welsh*, 23 Nov. 1838, 1 D. 94.

(b) 15 June 1839, 1 D. 1031.

(c) 20 Jan. 1841, 3 D. 394.

(d) *Walker v. Park*, 20 Jan. 1859, 21 D. 286 ; *Vines v. Hillou*, 13 July

(e) *Young v. Donaldson's Trs.*, 2d appeal, 15 Feb. 1862. See the terms of the destination stated, in Chapter XLIV., Section 2.

the surviving original legatees. The House of Lords ruled that the children of one of two residuary legatees who had died before the succession vested, were entitled only to their parents' share, and not to any part of what would have fallen to the other legatee had he survived. The Lord Chancellor (*a*) observed, that although the issue in such a case were entitled to the original legacy or share of the residue intended for the father, yet the Courts in Scotland had frequently said that this doctrine was not to be extended. In the present case, the lapsed share of the other legatee accrued only to the survivors; and as the appellant here did not take as a survivor, his claim could not be supported, either upon the implied condition or on the words of the settlement.

We are not aware that any recent case has occurred involving the application of the doctrine to a simple bequest in favour of children or other relatives, with an express destination over to third parties. The case of *Douglas* (*b*) is perhaps the nearest in point; and *Wood v. Aitchison* (*c*), where the ulterior destination was to the grantor's heirs and assignees, is a pretty direct authority. Several of the other reported cases involve the principle of a preference of the legatees' issue to the grantees under a general residuary destination (*d*).

It is certain that, according to our older practice, the issue of a joint legatee predeceasing the testator were allowed to succeed not only to the parent's original share of the fund, but also *jure accrescendi* to a rateable proportion of the share of any other of the joint legatees dying without issue (*e*); but the decisions we refer to must be held to be overruled by the judgment of the House of Lords in having regard to the observations of the law Lords in *Young v. Donaldson's Trustees* (*f*).

However, in the recent case of *Cattanach v. Birnie* (*g*), where a

Quære, Whether right of issue is preferable to that of Legatee under a destination over.

Whether issue of a deceased joint Legatee have the benefit of *jus accrescendi*.

Cattanach v. Birnie.

(a) Lord Westbury.

(b) *Douglas v. Douglas*, 21 Dec. 1843, 6 D. 218; *Glendinning v. Walker*, 30 Nov. 1826, 4 S. 237.

(c) 1789, M. 13043.

(d) See Bell's Prin. § 1776; *Rough-ead v. Rannie*, 1794, M. 6403; *Wilkie v. Jackson*, 9 July 1836, 14 S. 1121; *Colquhoun v. Campbell*, 5 June 1829, 7 S. 709.

(e) *Ratray v. Blair*, 8 Dec. 1790, Hume, 526; *Neilson v. Baillie*, 4 June 1822, 1 S. 458; *Mowbray v. Scougall*, 9 July 1834, 12 S. 910.

(f) *Young v. Donaldson's Trs.*, 15 Feb. 1862 (second appeal). See the case stated, and the Chancellor's opinion, *supra*.

(g) 2 July 1858, 20 D. 1206.

testatrix left the residue of her personal estate to the three children of her nephew, payable, one half "to them, or the survivors of them, share and share alike," on the youngest attaining majority (payment of the other half being postponed to the expiration of a life), and all the legatees died in minority, one of them only leaving issue, a daughter, the First Division preferred the daughter to the entire half of the residue which had vested. This decision is not necessarily inconsistent in principle with the cases of *Thornhill* and *Walker*; for, as Lord Curriehill observed (a), the survivors to whom the residue was destined were all extinct, and the legatee's daughter was the only person *in titulo* to claim the benefit of the residuary bequest.

III. *What Evidence will Exclude the Application of the Implied Condition.*

Settlor may provide specially for failure of the Legatee leaving issue.

It is agreeable to reason, and has been settled by decision, that where special provision is made by the settlor for the child of one of a family of legatees, whose parent has died before the execution of the settlement, such child shall not be entitled to rank with uncles and aunts as one of the family. In this case, there is neither the element of unforeseen contingency, nor the omission to provide for one in the favoured degree of relationship, which are the two grounds upon which the conditional institution of the issue is raised by implication (b). But in the case of collateral relatives, the mere fact that one of the family had died before the date of the settlement will not necessarily imply an exclusion of that legatee's children; because it may happen that the settlor, in making his will, has overlooked the fact, or has not been aware at the time who the parties are that occupy the position of nearest relatives. On this point Lord Moncreiff observed, that he did not think it "consistent with principles of human nature in men of good feelings, that it should make any difference in the view taken, that a particular nephew or niece of the precise class favoured, and against whom no expression of disfavour is anywhere found, unhappily had died many years before the date of the will" (c).

(a) 20 D. 1212.

(b) *Sturrock v. Binny*, 29 Nov. 1843, 6 D. 122.

(c) 6 D. 123.

It is quite settled that the fact of grandchildren being in existence at the date of a settlement in favour of children, without being mentioned in the settlement, does not deprive them of their hope of succession under the condition *si sine liberis*. The contrary was maintained in the case of *Neilson v. Baillie* (a); but the right of the issue was established by a decision of the whole Court, after a hearing in presence. The objection was revived in the cases of *Christie v. Paterson* (b) and *Booth v. Black* (c), where the fact, that the settlor, after becoming a party to his son's marriage-contract, had lived after the birth of grandchildren and the death of his son for many years, without altering his will, was much pressed in argument. But Lord Brougham gave effect to the implied condition, disregarding all special circumstances. The result of the arguments that have been raised in later cases leads to the conclusion, that it is only in the case of an express provision being made for the issue of decessing legatees within the prescribed limits of relationship, that such issue can be held to be excluded from the benefit of the doctrine of implied institution (d).

The omission to make provision for Legatee's existing children does not exclude the condition.

Extension of the Condition to Remoter Descendants.—In the event of a legatee predeceasing the period of vesting without issue surviving, but leaving a grandchild, it is not unreasonable to suppose that the testator, had he foreseen the event, would have instituted the grandchild conditionally, on the same ground of favour to representatives which has led to the recognition of the doctrine, *si sine liberis*, in the case of immediate descendants. The extension of the doctrine to the whole of the representatives of an institute in the direct line of descent, has now received the sanction of a decision of the Court in the Outer House (e); and whether we regard the literal meaning of the word "*liberi*," in the language of the civil law, as including the whole *familia*, or look simply to the reason of the maxim, the opinion, that grandchildren of the institute are entitled to the benefit of the condition, seems to be well founded.

"Liberi" held by Lord Mackenzie to comprehend all the Legatee's descendants.

(a) 4 June 1822, 1 S. 458.

(b) 5 July 1822, 1 S. 543.

(c) 16 July 1832, 6 W. & S. 175, affirming 9 S. 406.

(d) Compare *Greig v. Malcolm*, 13 S. 607, with *Dizon v. Broun*, 9 Feb. 1841, 2 Robinson, 1, affg. 14 S. 938,

and *Wilkie v. Jackson*, 14 S. 1121. Words of express disinherison will of course negative the presumption of implied institution.

(e) *Thomson's Trs. v. Thomson*, decided by Lord Mackenzie, Feb. 1862.

CHAPTER XXXVIII.

OF RESIDUARY INTERESTS.

AFTER all the special purposes of a settlement have been fulfilled, there may remain a surplus fund or residue; and the disposal of this surplus is the subject of a separate and final trust purpose. Without a residuary clause there can be no settlement.

What words
will create
a residuary
interest.

No particular form of words seems to be requisite to the effectual constitution of a destination of residue. The presumption being strong against the supposition of partial intestacy, it is scarcely possible that a settlor intending to dispose of the residue of his trust estate should fail to convey his meaning in adequate language; and accordingly there is scarcely any authority on the question of intention. A testator, however, while intending to dispose of his whole estate, may fail to provide for some contingency; and unless he has so provided, by a residuary clause broad enough to cover everything, the lapsed interest will result to his heirs-at-law (a).

In what cir-
cumstances an
interest may
lapse, or fall
into residue.

In a previous chapter we have investigated the whole subject of lapsed or resulting interests, including the consideration of the circumstances in which a lapse may occur, and the avoidance of a lapse in cases where a beneficial interest of a residuary character is given to the trust-dispensee (b). As preliminary to the examination of the question, what interests are carried by a residuary clause, we shall briefly recapitulate the various conditions which may lead to a partial failure of the truster's purposes, with the result, that the interest which was the subject of the purpose will either lapse or fall into residue.

(a) The extent of the residuary interest must be estimated as at the conclusion of the trust management, and not at the testator's death (*Mackenzie's*

Trs. v. M'Dowall, 11 Mar. 1852, 14 D. 739). But see *Adv.-Gen. v. Hill*, 19 Mar. 1862, 24 D. 808.

(b) Chapter X. (I. 177).

Where there is a partial disposition or settlement to certain persons for trust purposes to be afterwards declared, and the settlor dies without executing any deed of appropriation (a); or for trust purposes which are set aside by the Court as vague, inextricable (b), or unlawful (c), or which do not exhaust the estate (d), or upon trust to be distributed at the discretion of a party who dies leaving the power unexecuted (e), or for purposes which lapse by the predecease of the beneficiary (f), or in consequence of his being excluded by the law of approbate and reprobate (g), the equitable interest will either fall into residue or result to the heir. And although the whole interest in property conveyed by deed (h) or bequest (i) has not been impressed with the character of a trust in so many words, yet if a trust is declared of any part of the subject of the conveyance, the presumption is, that no beneficial interest was meant to be given to the trustees. In the absence of a residuary clause, such interests will therefore result to the heir-at-law.

Undisposed-of
interests.

In a very numerous class of cases (k), in which general and special (l) legacies and provisions were found to have lapsed in consequence of the legatees predeceasing the term of vesting, residuary legatees have been preferred to the lapsed interest. It is

What interests
fall into resi-
due. Lega-
cies.

(a) *Sinclair v. Trail*, 27 Feb. 1840, 2 D. 694; but see *Alston v. Marshall*, 2 July 1833, 11 S. 868; *Irvine v. Bannerman*, 20 June 1844, 6 D. 1173.

(b) *Bell's Pr.* § 1884; *Mason v. Skinner*, 6 Mar. 1844, 16 Jur. 422,—sequel of *M'Nair's* case as there stated.

(c) *Lord v. Colvin*, 7 Dec. 1860, 28 D. 111; *Keith's Trs. v. Keith*, 17 July 1857, 19 D. 1040.

(d) *Macfarlane v. Cranstoun*, 12 Dec. 1823, 2 S. 578; and see remarks on resulting interests under Charitable Trusts, I. 457.

(e) *Dundas v. Dundas*, 27 Jan. 1837, 15 S. 427; *Pursell v. Newbigging*, 25 Nov. 1856, 19 D. 71.

(f) *Torrie v. Munsie*, 31 May 1832, 10 S. 597; *Nasmyth v. Hare*, 17 Feb. 1819, F. C. See cases on lapsed interests noticed in Chapter XLIII.

(g) *Nisbet's Trs. v. Nisbet*, 5 Dec. 1831, 14 D. 145. See *Peat v. Peat*, 14

Feb. 1839, 1 D. 508; *Long v. Long*, 28 June 1860, 22 D. 1272.

(h) *Finnie v. Commrs. of Treasury*, 30 Nov. 1836, 15 S. 165; *Henderson v. M'Culloch*, 12 June 1839, 1 D. 927; *Hamilton v. Gordon*, 1724, M. 6588; *Blackwood v. Dykes*, 11 S. 443.

(i) *Soutar v. M'Grugar*, 22 Jan. 1801, F. C.; *Ramsay v. Anderson*, 26 Feb. 1836, 14 S. 570; *Miller v. Black's Trs.*, 14 July 1837, 2 S. & M'L. 866; *M'Leish's Trs. v. M'Leish*, 25 May 1841, 3 D. 914. The cases noted in this paragraph are instances of lapsed interests falling to the heir-at-law, and are cited as illustrations of the various modes in which the purpose of a bequest may fail.

(k) See Chap. XLIV. (Postponed Vesting); *Scott v. Scott*, 7 Feb. 1843, 5 D. 520.

(l) *Earl of Moray v. Stuart*, 1782, M. 8103.

of no consequence whether the property has been actually enjoyed by the testator, if he was in a position to dispose of the interest in it after his death. Thus, where a power was conferred on an annuitant of disposing and conveying at pleasure the capital sum of the fund set apart for payment of her annuity, it was held that a general settlement executed before the power came into operation, carried the fee to the annuitant's residuary legatees (a). A residuary clause carries a bonus on bank stock forming part of the estate (b); and it has been held to include the reversionary interest of a policy of assurance assigned by *ex facie* absolute disposition in security of a debt (c).

Estates of which the Trustee had the power of disposal.

Bonus on stock.
Policies of Assurance.

Legal claims, etc.

Interests resulting by the operation of the law of approbate and reprobate fall into residue. Thus, where a provision in favour of the settlor's children, with right of survivorship, was charged on heritable estate in Scotland, and one of the children claimed legitim, the lapsed interest was found not subject to accrescion, but to devolve on the residuary legatee so as to enlarge the residuary interest out of which legitim was payable (d).

Lapsed interests in heritable estate.

Several decisions are to be found in the English Reports on the question, whether lapsed legacies charged on real estate will fall into a residue limited to personalty (e). In *Advocate-General v. Williamson* (f), where a power of sale, added to certain directions, was held effectual to change the succession from heritable to moveable, it was assumed that the expression "means and effects" would carry the residuary proceeds of the heritable estate, for legacy duty was charged on the whole estate as *testate* succession. It would seem, therefore, that a residuary clause conceived in terms applicable in their strict sense to moveable property, would be sufficient to carry lapsed bequests directed to be paid out of the proceeds of heritage directed to be sold; but a legacy charged as a burden on an estate which is to be specifically conveyed, can scarcely be held

Converted heritage.

(a) *Hyslop v. Maxwell's Trs.*, 11 Feb. 1834, 12 S. 419.

(b) *Cumming v. Cumming's Trs.*, 26 Feb. 1824, 2 S. 743.

(c) *Marquis of Queensberry v. Scot. Un. Ins. Co.*, 8 Mar. 1842, 1 Bell, 183, aff. 1 D. 1203.

(d) *Breadalbane's Trs. v. Pringle*,

15 June 1841, 3 D. 357. See *Peat v. Peat*, 14 Feb. 1839, 1 D. 508.

(e) *Amphlett v. Parke*, 2 R. & M. 232; *M'Leland v. Shaw*, 2 Sch. & Lef. 545, and cases in Lewin, Chap. VIII.

(f) *Adv.-Gen. v. Williamson*, 23 Jan. 1840, Ex. Rep. No. 1.

to be within the scope of a residuary clause; and if it lapsed, we think the heir to whom the estate was destined would be entitled to the benefit of it.

In the event of the distribution of the beneficial estate being postponed during the subsistence of life annuities, it is held that the accumulations of the surplus proceeds fall into residue (*a*). For determining the respective interests of the annuitants and residuary legatees in the annual proceeds of a fund charged with an annuity divisible in equal shares, the following rules were laid down by the House of Lords in the case of *Casamaijor v. Pearson*: (1) That the annuitants were respectively entitled to payment of their provisions for any one year, only in so far as the free annual proceeds of the fund during such year were sufficient for the payment thereof; (2) That when in any year the free proceeds exceeded the aggregate amount of the annuities, the surplus belonged to the residuary legatees; and (3) That on the death of one annuitant, the survivor was entitled to payment of one-half of the fixed annuity if the interest of the residue was sufficient to meet this share (*b*). Although a life interest lapses in consequence of the widow claiming her legal provisions, the interest of the heir remains entire; but it does not emerge until the death of the life tenant, and the intermediate proceeds fall into residue (*c*).

Surplus proceeds of residue burdened with annuities.

Casamaijor v. Pearson.

Life interest.

With regard to any interest and annual proceeds of estate, whether heritable (*d*) or moveable (*e*), not specially appropriated, the general rule—subject, of course, to the limitation introduced by the Thellusson Act—is, that such proceeds must be accumulated for the benefit of the beneficiaries entitled to residue, until the arrival

Accumulations of interest.

(*a*) *Ramsay v. Anderson*, 26 Feb. 1836, 14 S. 570; *Casamaijor v. Pearson*, 29 April 1841, 2 Rob. 217; *Sturgis v. Campbell*, 19 June 1861, 23 D. 1128; and see Chapter XXXVI. Section 3, p. 227.

(*b*) 2 Rob. 217; but see *Boyd v. Boyd*, 5 July 1851, 13 D. 1302; *Berry's Trs. v. Cox's Trs.*, 18 June 1850, 12 D. 1037.

(*c*) *Dixon v. Fisher*, 1 July 1833, 6 W. & S. 431, affg. 10 S. 55; *Peat v. Peat*, 14 Feb. 1839, 1 D. 508; and see

Rutherford v. Turnbull, 29 May 1821, 1 S. 37.

(*d*) *Templar v. Templar*, 1 Apr. 1828, 3 W. & S. 47, aff. 4 S. 460. But where provisions are appointed in virtue of a power to charge the rents of an entailed estate during a term of years, it would seem the interest of the rents is not chargeable. *Earl of Wemyss v. Trail*, 23 Nov. 1810, F. C.

(*e*) *Pursell v. Newbigging*, 25 Nov. 1856, 19 D. 71; *Campbell v. Reid*, 12 June 1840, 2 D. 1084; *Sturgis v. Campbell*, *supra*.

of the period of division. Where the payment of residue to children is deferred till the attainment of majority, it would seem that a power to provide for their maintenance out of the interest may be inferred from slight indications of intention, if indeed it is not implied in the nature of the bequest (a).

Interest on deferred legacy.

The interest accruing on a deferred legacy of a special fund accretes to the capital (b).

Specialty in the case of interest on money to be laid out on land.

The interest of a fund directed to be invested in land, to be settled in accordance with the trustor's directions, is payable to the heirs in the destination from and after the time at which the trustees ought, in the exercise of a reasonable discretion, to have made the investment (c).

Undisposed-of capital, where interest given in liferent.

Where the interest of a fund is directed to be applied for the use of a beneficiary, it is a question of intention whether the capital results, or is impliedly given to the legatee. If the testator's object is apparently to withhold immediate payment of the capital for the purpose of securing the interest as an alimentary fund, a legacy of the capital may be implied (d).

Lapse by failure of one or more of the residuary legatees;

Although a testator has apparently provided by a total settlement, or by means of a general residuary clause, for the disposal of his entire succession, it may happen, notwithstanding, that his intention is defeated by the occurrence of a lapse; as, for example, in the event of the predecease of one or more of the parties to whom shares of the residue have been appointed (e), or through the non-exercise of a power of disposal given to a liferenter (f), or in the event of a repudiation of the settlement by any of the parties (g). The case of *Nisbet's Trs. v. Nisbet* (h) decided that where a residuary legatee obtained a reduction of the settlement *quoad* the heritage,

by residuary legatee repudiating the settlement.

(a) *Campbell v. Reid*, *supra*. See Chapter XXXVI. Section 3.

(b) *Glasgow's Trs. v. Glasgow*, 30 Nov. 1830, 9 S. 87; *M'Alister v. M'Alister*, 30 Nov. 1836, 15 S. 170.

(c) See the cases on this point commented on in Chapter XVIII., Section 2. (Duties of Trustees for the Execution of Settlements.)

(d) *Sanderson's Exer. v. Kerr*, 21 Dec. 1860, 23 D. 227; and see *Burnside v. Smith*, 10 June 1829, 7 S. 735;

Blane v. Bell, 5 De Gex & Sm. 658; 2 Roper on Leg. 1475; Broom's Legal Maxims, 606; 2 Williams on Executors (5th Ed.), 1074.

(e) *Torrie v. Munsie*, *infra*.

(f) *Alves v. Alves*, 8 Mar. 1861, 23 D. 712.

(g) *Nisbet's Trs. v. Nisbet*, *infra*.

(h) *Nisbet's Trs. v. Nisbet*, 5 Dec. 1851, 14 D. 145; see *Breadalbane's Trs. v. Lady E. Pringle*, 15 June 1841, 3 D. 357.

ex capite lecti, and thereby forfeited his residuary interest in the moveable estate, his share did not result, but became divisible among the co-residuaries. But a different rule prevails in the case of a residuary's share lapsing by the predecease of the legatee. In that case the law has been settled, since the decision in *Torrie v. Munsie*, that a lapsed share of residue results to the settlor's next of kin (a), unless the destination of residue is conceived in terms which give, expressly or impliedly, a joint interest (b). However, in a case where a testator divided the residue of his estate into twenty-four equal shares, reserving power to dispose of two of the shares which he left unappropriated, with a precatory direction, that in the event of his failing to do so, the amount of the unappropriated shares should be merged in the general division, it was held by Lord Wood, in consideration of the manifest intention of the testator to exclude any resulting interest, that the share of a predeceasing beneficiary ought to follow the residuary destination impressed upon the unappropriated shares (c).

Predecease of
residuary
Legatee.

Undisposed-of
residue.

It is obvious that provision may be made against the lapse of shares in a total succession by means of an ulterior residuary destination. Thus, where the residue of an estate was destined to the children of A. and B. in equal shares, it was observed, that although this destination, being in terms of severance, would not carry a lapsed interest to the survivors, yet the addition of the words, "I hereby appoint the children of the said A. and B. to be my residuary legatees," was effectual, as a joint residuary bequest, to exclude the next of kin (d). In taking instructions for a settlement, the attention of the testator should always be directed to the necessity of providing against a total or partial lapse of the residuary interest, by means of a destination over on failure of the residuary legatee, or, where there are more than one, by a provision of survivorship.

Ultrior
destinations of
the residuary
interest.

(a) *Torrie v. Munsie*, 31 May 1832, 10 S. 597.

273; *Arbuthnott v. Arbuthnott*, 7 June 1816, Hume, 274.

(b) *Brown v. Campbell*, 16 Mar. 1855, 17 D. 759; *Thorburn v. Thorburn*, 16 Feb. 1836, 14 S. 485; *Robertson v. M'Vean*, 10 Dec. 1819, Hume,

(c) *Irvine v. Bannerman*, 20 June 1844, 6 D. 1173; and see *Alston v. Marshall*, 2 July 1833, 11 S. 868.

(d) *Alves v. Alves*, 8 Mar. 1861, 23 D. 712. *Per* Lord J.-C. Inglis, 716.

CHAPTER XXXIX.

OF SUBSTITUTIONARY AND ACCUMULATIVE
LEGACIES.

Uncertainty
of the law
as to double
legacies.

THE leading case in this class of questions is that of *Horsbrugh v. Horsbrugh* (a), decided by the whole Court in 1847. This case is deserving of an attentive consideration on several grounds. In the first place, it raised for decision some very important questions on accumulative and substitutional legacies, in a way that necessitated a resort to fixed principles of interpretation as distinguished from conjectural interpretation. On another ground it must be regarded as a leading authority, because it was a decision based upon the opinions of the whole judges, all of whom, including in their number several jurists of acknowledged eminence, gave separate opinions. This very circumstance, however, while it enables us to illustrate many of the recognised distinctions in this branch of law by apposite quotations, makes it extremely difficult to represent with accuracy the collective opinion of the Court upon any one of the questions submitted to its decision; for it appears, unfortunately—as was almost inevitable, where many minds were directed to the solution of questions depending on a variety of complex considerations—that the judges differed very much amongst themselves as to the relative importance of the various elements of intention presented by the terms of the bequests. Independently of the merits of the judgment, the case is valuable on account of the clear recognition, in the opinions of almost all the judges, of the principle of uniformity of interpretation throughout the United Kingdom, on the question, whether a particular bequest is operative. As the elucidation of

(a) *Horsbrugh v. Horsbrugh*, 12 Jan. 1847, 9 D. 329; 1 Mar. 1848, 10 D. 124. The case is also reported in 9 D. 324, on a preliminary point, viz., whe-

ther a particular writing was to receive effect as forming a part of the testatrix's will.

this branch of our subject will be very much aided by taking into view the decisions of the judges of the Court of Chancery—who have striven, and with considerable success, considering the inherent difficulty of the problem, to bring the interpretation of double legacies under the dominion of positive law—it is necessary, in order to justify the proposed treatment of the subject, to refer to the authorities which, as we think, establish the principle of uniform interpretation.

In *Horsbrugh v. Horsbrugh*, the Lord Justice-Clerk Hope observed, that in point of practical application, there did not seem to be any substantial difference between the laws of England and Scotland,—an opinion which he supported by an analysis of the leading English cases which had been decided up to that date (*a*). Lord Cuninghame, recognising the authority of the English cases, rested his opinion (*b*) on the rule laid down by Lord Lyndhurst in the case of *Fraser v. Byng* (*c*), viz., that when a codicil appeared to be “a review of the whole dispositions of the will,” no duplication of the legacies should be inferred. Lord Moncreiff, in the same case, and still more clearly in the subsequent case of *Grant v. Stoddart* (*d*), expressed his concurrence in the principles of interpretation that had been laid down by the English lawyers, referring, in the latter case, to Mr Justice Williams’ exposition of the law as to duplication of wills and implied revocation. Lord President Boyle, observing that in the Civil, Scottish, and English laws certain principles had been fixed with reference to the interpretation of double legacies, proceeded to show that the presumption of the English law in favour of duplication had received the sanction of our own Courts in the case of *Elliot* and other cases (*e*). In the previous case of *Straton’s Trs. v. Cuningham* (*f*), the Lord President had observed that he was disposed to give much weight to the English decisions on this class of questions,—a remark in which Lord Medwyn concurred, observing, that the rule laid down in *Fraser v.*

Identity of the principles of interpretation recognised by the Courts of England and Scotland.

(*a*) 9 D. 340–342.

(*b*) 9 D. 352.

(*c*) 1 Russ. & My. 90.

(*d*) *Grant v. Stoddart*, 27 Feb. 1849, 11 D. 860; see p. 872. See also Lord Ivory’s opinion in *Horsbrugh’s case*, 9 D. 375.

(*e*) 9 D. 379. Lords Mackenzie and Fullerton also identified the English, Roman, and Scottish systems, in their observations.

(*f*) *Straton’s Trs. v. Cuningham*, 10 Mar. 1840, 2 D. 820.

Byng was a very reasonable rule of construction, and that the question was as to its application. In *Stoddart v. Grant*, Lord Truro referred alternately to English and Scotch decisions, both on the question of implied revocation and accumulation of legacies; adding, that it was scarcely necessary to refer to authorities in support of principles which were well settled and understood throughout the kingdom (a).

Rules adopted by Lord Bathurst from the Scotch case of *Stirling*.

It deserves to be noticed, that in the leading English case of *Hooley v. Hatton* (b), to which reference will immediately be made, Lord Bathurst referred to *Stirling's* case (c), decided by the Court of Session, as being in accordance with the principles of the civil law, upon which his judgment was rested.

Legacies given to the same person by different instruments presumed to be cumulative.

Stirling v. Deans.

The principle established by the cases of *Stirling* and *Hooley v. Hatton* was, that where legacies of quantity were given to the same person, but under different instruments, in the absence of any indication of a contrary intention, both were due, notwithstanding that the bequests were similar in form, and for the same sums. In the former case (d), the testator, Thomas Deans, by his testament, legated to his sister the sum of 6000 merks, and burdened his heir and executor with it. He afterwards assigned to the same person the sum of 6000 merks, owing to him by a debtor; and the argument was taken, as the Lord Justice-Clerk remarked in *Horsbrugh's* case (e), on the footing that both gifts were legacies. The Lords found, that "though it was the same testator, the same legator, and the same sum, yet the last having no relation to the first, they were both due, and the last did not come in place of the first, nor absorb it, this being *quæstio conjectura voluntatis defuncti*."

Hooley v. Hatton.

In *Hooley v. Hatton* (f), the testatrix, by her will, gave to Lydia Hooley, her woman, a legacy of L.500. By a subsequent codicil she gave to the same person a legacy of L.1000; and the question was, whether the last legacy alone passed, or the legatee should have both the L.1000 and the L.500. The case was argued at great length, and decided by Lord Chancellor Apsley, afterwards Earl of Bathurst, assisted by Lord Chief Baron Smyth and Mr Justice

(a) *Stoddart v. Grant*, 28 June 1851, 1 Macq. 163; see 170, 171, & 175.

(b) *Hooley v. Hatton*, *infra*.

(c) *Stirling v. Deans*, *infra*.

(d) *Stirling v. Deans*, 1704, M. 11442; 2 Fount. 231.

(e) 9 D. 343.

(f) *Hooley v. Hatton*, Br. Ch. Ca. 390; 2 Wh. & T. L. C. 285.

Aston. The latter learned judge, who delivered the leading opinion, reviewed the Civil law and French authorities, and in conformity with them laid down the following propositions:—First, when the same specific thing is given twice, the legacy can take effect but once (*a*); and secondly, where the like quantity is given twice, if the repetition was in the same writing and of the same amount, it might be attributed to forgetfulness; but where equal sums were given in two distinct writings, both ought to pass (*b*). Third and fourthly, as to a less sum or a larger in the latter deed, the presumption is for two legacies, and the heir must show that the one was meant to be blended with the other. The result was, that a legacy was not double where it was given for the same cause, in the same act, and *totidem verbis*, or only with small difference; but where in different writings there was a bequest of equal, greater, or less sums, it was an augmentation.

Rules of construction laid down by Mr Justice Aston.

Specific legacies.

Legacy in the same,

and in different instruments.

Legacies of greater or less amount.

I. Legacies given by Different Instruments.

In order that legacies given by different instruments may both receive effect, it must appear that both instruments were intended to be operative. The tendency of the later decisions is to sustain all testamentary writings that have not been expressly or impliedly revoked; and revocation is only implied where both instruments profess to dispose of the entire estate, in which case the latter deed is held to revoke the former, as being inconsistent with it (*c*). Accordingly, where there exists a doubt as to both deeds being operative, the practice is to dispose of that question in the first place (*d*). The fact that legacies are given to the same persons in both instruments, affords no evidence of any intention to take away the testamentary character of the first instrument; for implied revocation is only to be inferred as a consequence of inconsistency in the two dispositions, which cannot be argued from the repetition of legacies to the objects of the testator's favour (*e*). If two instruments are

Legacies not cumulative unless both instruments intended to be operative.

Presumed revocation

(a) Dig. Lib. 22, Tit. 3, L. 12.

(b) Dig., *ut supra*; Ricard, *Traité des donations*, vol. i. p. 419, and other authorities. See the report in White & Tudor, *ut supra*.

(c) *Grant v. Stoddart*, 1 Macq. 163, revg. 11 D. 860; *Baird v. Jaap*, 15

July 1856, 18 D. 1246; *Beattie v. Thomson*, 21 June 1861, 23 D. 1163.

(d) *Horsbrugh v. Horsbrugh* (1st report), 4 May 1845, 9 D. 324; and cases of *Baird and Stoddart*, *supra*.

(e) Per Lord Truro in *Stoddart v. Grant*, 1 Macq. 174.

where both settlements are total.

both of them total dispositions of the testator's succession, it would seem that the first can have no operation, even in favour of legatees not named in the second (a). In a case where legacies were claimed under two successive general dispositions, Lord Justice-Clerk Inglis observed: "In this case both deeds are intended to apply to the whole property of the testator; each of them contains a universal conveyance. As by each of them the entire estate is conveyed and divided, it is obvious they cannot both receive effect, or both be taken as parts of one settlement. It is perfectly clear that the latest deed must be taken as the testator's settlement" (b).

Examples of the presumption for duplication.

The principle that duplication must be presumed in the absence of internal evidence of a contrary intention, has received the sanction of the Courts of both countries in numerous cases. In *Elliot v. Lord Stair's Trustees* (c), a leading authority, the testator by a codicil to his trust settlement directed his trustees to pay Mr Elliot L.3000, without any qualification; and by a codicil made two years later, he bequeathed to the same party the sum of L.3000, "free of the legacy tax, and of all other deductions." Lord Meadowbank, being of opinion that the codicils contained no evidence of intention other than that which arose from the terms of the two bequests, and upon general principles, decided in favour of the legatee. The Court at first altered, but on reconsideration unanimously adhered to the Lord Ordinary's interlocutor. From this and other cases it is apparent that substitution is not to be inferred because the subsequent legacy is of the same amount (d); and it has been expressly decided that a subsequent legacy of larger amount was not to be presumed substitutional, but additional to the former; for, said Lord President Hope, whatever the testator's intention might have been, he had given the party a right to demand

Legacies of the same amount in different writings not presumed to be substitutional.

(a) *Beattie v. Thomson*, *infra*; *Stewart v. Baillie*, 27 Jan. 1841, 3 D. 463; *Sellar v. Stephen*, 21 June 1855, 7 D. 975. This is now, since 1 Jan. 1838, the law of England; see 2 Wh. & T. 298; though prior to that time legacies in the former will were operative, so far as no substitution was provided in the latter (*Kidd v. North*, 14 Sim. 463; *Jackson v. Jackson*, 2 Cox, 85).

(b) *Beattie v. Thomson*, 21 June 1861, 23 D. 1163, 1166.

(c) *Elliot v. Stair's Trs.*, 27 Feb. 1823, 2 S. 250.

(d) *Stirling v. Deans*, *supra*; *Lindsay v. Anstruther's Trs.*, 6 Feb. 1827, 5 S. 297; *Gillespie v. Donaldson's Trs.*, 22 Dec. 1831, 10 S. 174. See the English cases, which are very numerous, cited in 2 Wh. & T. 290.

payment of both the legacies (*a*). *A fortiori*, if the second legacy is given under a different description (*b*), or is charged upon different heirs or different subjects (*c*); or if the reversion is given over to a different person (*d*), or under different conditions—as where one of the legacies is alimentary, or to a married woman for her separate use (*e*); or in the case of joint legacies, if different parties are joined with the claimant (*f*),—the legacies will be held to be accumulative. The same construction will necessarily be put upon double legacies which are not *ejusdem generis*; so that even where, in consequence of an apparent intention on the part of the testator to remodel his dispositions, successive pecuniary legacies are found to be substitutional, yet if annuities be also given by the same or different instruments, they will be held additional (*g*).

A fortiori,
where legacies
are different.

In determining the effect to be given to successive testamentary dispositions, a donation or assignation *mortis causa* is regarded as a legacy (*h*). Thus, where a testatrix bequeathed a legacy of L.1000 5 per cent. stock, or alternatively L.1000 sterling, and after the 5 per cents. had been converted into new 4 per cents., transferred L.1000 of the latter stock to the legatee, who ordered payment of the dividends to be made to the testatrix during her life, the legatee was held entitled to both the donations; for, asked Lord Gillies, what purpose was the transfer to serve if it did not import something more than the legacy already provided? The pursuer derived

Donations and
assignments
mortis causa.

(*a*) *M'Intyre v. M'Farlane*, 1 Mar. 1821, F. C.

(*b*) *Elliot v. Stair's Trs.*, *supra*; *Horsbrugh v. Horsbrugh* (2d point), 1 Mar. 1848, 10 D. 824.

(*c*) *Frew v. Frew*, 15 Feb. 1828, 6 S. 554.

(*d*) *Straton's Trs. v. Cunningham*, 10 Mar. 1840, 2 D. 820. So also Lord Pr. Boyle observed, "Where, in the first legacy to a particular legatee, certain provisions are made for the interest of third parties which are affected in bequeathing the same sum a second time to the same legatee, that affords a circumstance of real evidence to show that effect is to be given to both legacies." *Horsbrugh v. Horsbrugh*, 9 D. 879.

(*e*) *Thomson v. Lyell*, 18 Nov. 1836, 15 S. 33; *Lindsay v. Anstruther's Trs.*, 6 Feb. 1827, 5 S. 297.

(*f*) *Horsbrugh v. Horsbrugh* (1st and 4th point), 12 Jan. 1847, 9 D. 829.

(*g*) *Baird v. Jaap*, 15 July 1856, 18 D. 1246. See the principle stated in the Lord President's speech, p. 1280. *Smith v. Donaldson*, 10 June 1829, 7 S. 734.

(*h*) *Watson v. Blair*, 15 Nov. 1831, 10 S. 12; *Stirling v. Deans*, 1704, M. 11442; *Stuart v. Fleming*, 1623, M. 11439; *Lord Cardross v. E. of Mar*, 1639, M. 11440. In those cases both provisions were of a testamentary nature. For the cases of ademption of marriage-contract provisions by legacies, see the following chapter.

no immediate benefit from it; and unless the object of the transaction were to confer an additional benefit on the pursuer over and above the legacy, it was altogether futile (a).

Construction where Testator declares certain legacies to be additional, and is silent as to others.

If a testator by a posterior will declare certain legacies to be in addition to those formerly given (b), it may fairly be argued, from the absence of such expressions in other instances, that the intention as to such legacies was to give in substitution; but the inference is not always conclusive. In *Russell v. Dickson* (c), Lord Chancellor Sugden remarked upon this circumstance:—"I assent to the argument, that if a testator expressly declares one gift to be in addition to another (and for this purpose the Court is entitled to look at other parts of the same instrument, or at gifts in other testamentary instruments), and in another instance makes a gift without any such declaration, this is a circumstance to show that the latter was intended not to be additional, but in substitution. But still too much weight must not be attached to the variation. To hold that it is conclusive, would be going too far. It is a circumstance, no doubt, important to show that, where the testator meant addition, he knew how to express his meaning, and a party is entitled to rely on it to that extent." On the other hand, if a testator expressly provide that one legacy shall be in lieu or in satisfaction of another (d), it may by parity of reasoning be inferred that legacies not stated to be in satisfaction are additional. And if some legacies are declared to be in addition to, and others in lieu of legacies formerly given, the presumption with regard to legacies given simply which might have arisen from the use of either of those expressions alone, would seem to be neutralized (e).

Construction where certain legacies are declared to be substitutional.

How far the argument drawn from expressions in other legacies is reliable.

In the leading case of *Lee v. Pain* (f), Sir J. Wigram, V.C., observed, that the argument drawn from the use of such expressions was only legitimate when used in corroboration of the inference arising from other circumstances; and that the use of superfluous words in one part of a will was insufficient to control the proper

(a) 10 S. 15.

(b) See *Gillespie v. Donaldson's Trs.*, 22 Dec. 1831, 10 S. 175; *Elliot v. Lord Stair's Trs.*, 27 Feb. 1823, 2 S. 251; *Horsbrugh v. Horsbrugh*, 9 D. 345, per Lord J.-C. Hope.

(c) *Russell v. Dickson*, 2 D. & War. 133.

(d) *Lindsay v. Anstruther's Trs.*, 6 Feb. 1827, 5 S. 297; *Henderson v. Burt*, 16 Jan. 1858, 20 D. 402.

(e) *Elliot v. Stair's Trs.*, *supra*.

(f) *Lee v. Pain*, 4 Hare, 201, 221.

effect of words in another part of the same instrument; for, *expressio earum quæ tacite insunt nihil operatur*. As an argument in corroboration of the apparent scope and purpose of the posterior writing, there can be no doubt that the inference deducible from the use of such expressions is legitimate; and to this extent the Scotch authorities already cited support the principle laid down by Lord St Leonards and Sir J. Wigram.

Sometimes there is a difficulty, in consequence of the ambiguity of the language used by the testator, in determining to what extent a legacy is intended to operate as an additional provision. Thus in *Smith v. Donaldson* (a), a testator, after having by his trust settlement appointed his trustees to pay one-half of the free proceeds of his moveable estate to his wife, added a codicil, by which he bequeathed, "in addition to the legacies contained in the deed of settlement already executed by me," the interest arising from all such free money as he might leave behind him at his death, for her liferent use; declaring that she should have no right to the principal *in virtue of this bequest*. Lord Mackenzie and the Court ruled that the widow was entitled to the capital of one-half of the estate in virtue of the settlement, and to the interest of the other half in virtue of the codicil; for, though no interest in the principal was given to her in virtue of the latter bequest, it was given to her by the settlement, and had never been effectually taken away.

Ambiguous language in reference to question of duplication.

Smith v. Donaldson.

In *Henderson v. Burt* (b), the ambiguity arose from the position of the words of gift in the second instrument. The testator, by his ante-nuptial contract, had secured to his widow an annuity of L.100 Scots, and the liferent of a house and furniture, etc. By his testamentary settlement he gave her the liferent use of certain heritable subjects, adding the words, "and these in addition to what is provided to her by contract of marriage, and the sum of L.8 sterling yearly during all the days of her lifetime." The Court held that the legacy of L.8 was the same as the ante-nuptial provision of L.100 Scots. This construction is, we think, contrary to principle; for, to support it, it is not only necessary to disregard the difference between the two sums, but also to construe the word "and" in the sense of "including."

Henderson v. Burt.

(a) *Smith v. Donaldson*, 10 June 1829, 7 S. 734.

(b) *Henderson v. Burt*, 16 Jan. 1858, 20 D. 402.

Legacies
given upon
different mo-
tives.

If in one of the instruments a motive be assigned for the gift, and in another a legacy of the same sum is given for a different motive, or without any motive assigned, the presumption is for duplication; and conversely, where two legacies are given, though in different instruments, and there is an exact coincidence both in the sums given and the motives assigned, the posterior bequest is presumed to be given in substitution.

Inference from
similarity of
motive.

It would appear, however, that a mere similarity in the motives will not be sufficient to redargue the presumption for accumulation if the sums are different (*a*); nor will a coincidence in the sums, in the absence of any expressed motive, suffice to raise a presumption for duplication. It is true that Lord Thurlow once observed, in words which have often been cited, that "simple repetition, when it is exact and punctual, has been regarded as sufficient proof that it is only intended for repetition" (*b*); but this dictum has not been recognised as authoritative in England (*c*), and it stands in direct opposition to the authority of the principle laid down in *Stirling's* case (*d*), upon which the interpretation of double legacies in the United Kingdom is based. Accordingly, Lord Fullerton, in the leading case, observed that the Court could not adopt the reasoning ascribed to Lord Thurlow, as it was in direct opposition to the general principle. "To hold," he said, "that simple and punctual repetition of a legacy of the same amount is of itself sufficient to show that mere repetition and not duplication was intended, is just to lay down, in other words, that separate writings do not import separate legacies. It may be true, that when the repetition is exact and punctual, that forms a circumstance admitting more easily of being confirmed by additional

(*a*) *Lord v. Sutcliffe*, 2 Sim. 273; *Hurst v. Beech*, 5 Madd. 352, where the legacies were given for faithful service. "The presumption," said Sir John Leech, "cannot be raised in this case, although it be admitted that the motives are the same, inasmuch as the sums are different."

(*b*) *Moggridge v. Thackwell*, 1 Ves. jun. 464.

(*c*) See Sir Wm. Grant's observations in *Benyon v. Benyon*, 17 Ves. 42;

also *Roch v. Callen*, 6 Hare, 531, where a testatrix, by two different deeds, bequeathed annuities of the same amount to her servant E. H., and Wigram, V.-C., held that they were given cumulatively, as the word servant did not express the motive, but was only descriptive; and *Lobley v. Stocks*, 19 Beav. 392.

(*d*) *Stirling v. Deans*, 1704, M. 11442.

intrinsic evidence. But still, some such additional intrinsic evidence is indispensable; and in the absence of it, the separate writings must each receive full effect" (a). The assignment of a special motive in the posterior writing, was considered a sufficient reason for holding one of the legacies to be additional, in a case where there was intrinsic evidence of an intention to revise,—leading, in the case of other bequests given by the same deed, to the inference that they were intended to be substitutional (b).

The intention of the testator, when it can be collected from the instruments containing the legacies, will of course override the general presumption for duplication which arises in the absence of such intention. An intention to substitute one legacy for another may legitimately be inferred in the following cases: First, where the second instrument expressly refers to the first in terms which indicate an intention to alter its provisions in the manner of revision, and not merely by addition (c); secondly, where, from the structure and form of the settlements, the intention is apparent that both should not be operative, *e.g.*, where both are total (d); thirdly, where the instruments are either exactly or very nearly identical in their provisions—and the more numerous the instruments are, the inference will be the stronger—the absence of any material variance between the prior and the posterior dispositions of

Presumption
against dupli-
cation, —

When Testa-
tor is revising.

When both
settlements
total.

When instru-
ments identical
as a whole.

(a) *Horsbrugh v. Horsbrugh*, 9 D. 383.

(b) *Horsbrugh v. Horsbrugh* (3d case), 1 Mar. 1848, 10 D. 824, 826; and *Ridges v. Morrison*, 1 Bro. Ch. Ca. 388, cited by Lord Pr. Boyle; and see his Lordship's remark in 9 D. 379. The decision on the 11th point in *Horsbrugh's* case (9 D. 329), appears at first sight inconsistent with the finding on the point noticed in the text; but the explanation probably is, that the direction to see certain legacies to other parties paid, was not a motive, but a condition annexed to the bequest.

(c) *Baird v. Jaap*, 15 July 1856, 18 D. 1246; *Henderson v. Burt*, 16 Jan. 1858, 20 D. 402; *Horsbrugh v. Horsbrugh*, 12 Jan. 1847, 9 D. 329. The principle which was given effect to

in most of the points raised in that case, and which Lord Pr. Boyle thought had been carried too far, was thus stated by his Lordship:—"Unless it appears to be clear that the first legacies are revoked when the second legacies are given, I think that the legatees are entitled to both legacies. I do not say there must be a formal revocation. If there is undoubted evidence of a revocation of the first legacies in the settlement viewed as a whole, then such revocation must receive effect" (9 D. 380).

(d) *Beattie v. Thomson*, 21 June 1861, 23 D. 1163; *Stewart v. Baillie*, 27 Jan. 1841, 3 D. 463. See *Grant v. Stoddart*, 28 June 1852, 1 M'Q. 163, and 11 D. 860; *Seller v. Stephen*, 21 June 1855, 17 D. 975.

When second deed caused by altered circumstances of Legatee.

Baird v. Preston.

The last of two total settlements is to be preferred.

General similarity of the instruments.

Alteration of the destination in consequence of altered circumstances of the Legatee.

the estate will be converted into an argument that the intention was in substance to repeat or republish the prior disposition ; fourthly, substitution may be inferred where the form of the disposition has been altered to meet the altered circumstances of the legatee.

1. As an example of the first element of intention, we may instance the expressions used in the last testamentary writing of Lady Baird Preston (*a*), where the testatrix having referred to the diminution of her resources as a reason for altering her list of legacies, it was justly held that the alteration contemplated must have been an alteration which would have the effect of detracting from, and not of adding to the charges on her estate, and that the legacies given by that instrument were accordingly substitutionary, in so far as they were *ejusdem generis* with those given in previous writings, though different in amount.

2. As to the second element of intention, it has been already considered, in referring to the class of cases in which the Court has laid down the principle, that if both settlements embrace dispositions of the legal as well as the equitable estate, one of them only is capable of being effectuated, and therefore the posterior settlement, as containing the expression of the testator's last will, is to be preferred.

3. The similarity of the different testamentary instruments, and the repetition in them of a number of legacies of the same amount, were among the main reasons which induced the Court to reject the claims of the legatees for double and triple provisions in the cases of *Horsbrugh* and *Baird*, which have been so often referred to. It appears from Messrs White & Tudor's analysis of the Chancery decisions that this is considered in England also to be a sufficient reason for rejecting the supposition of duplication (*b*)

4. If the posterior disposition is settled in a different manner from the prior, and the alteration has an obvious reference to some change in the situation of the legatee, the presumption for dupli-

(*a*) The words referred to are:—
"The enormous expense into which I have been led by lawsuits having circumscribed very much my funds, I have this day altered my list of legacies. . . . Legacies to be reconsidered when I know the end of

the Chancery suit, which I expect daily, when I hope to add to the list." See 18 D. 1251.

(*b*) 2 Wh. & T. 296, and 1 Russ. & My. 102; and *Methuen v. Methuen*, 2 Phillim. 416, there referred to.

cation is taken away. This is the principle of the case of *Belshes v. Sir P. Murray* (a), which was so frequently referred to in argument in the cases that occurred in the early part of the present century. The testator, Anthony Murray, in his first general settlement, bequeathed to his niece, Emilia Murray, a legacy of L.300, payable at the first term *after her marriage*, with interest thereafter, and an annuity of L.17 stg., payable until marriage. He afterwards executed a second settlement bearing reference to the first, and adopting the legacies contained in it. The niece afterwards married, and had issue two sons; and Mr Murray then executed a bond of provision in favour of the family, by which he bound his executors in payment of a legacy of L.1200, payable to the lady for her *liferent use*, and to her children in fee; whom failing, to her husband, subject to a power of division. Both legacies were claimed; but the executor maintained successfully, that, as the first legacy was given to the niece with reference to her then condition as a single woman, and the testator had afterwards settled funds of larger amount upon herself and her family, it must be presumed that this was all he intended to give (b). The Lords found the legacy of L.300 not due. On the same view of the testator's intention, Lord Alvanley, by two decisions (c), cited with approbation by Sir J. Wigram (d), established the principle, that if a party leave a legacy to the children of a family without naming them, and after the family has either increased or diminished in number, leave a legacy to the children by name, the later legacy shall be taken as substitutionary to the former.

Belshes v. Murray.

II. Duplication of Legacies in the same Instrument; and Duplication of Specific Legacies.

1. Legacies of quantity given by the *same instrument* to the same person, and equal in amount, are, according to the doctrine of the English lawyers, regarded as repetitions of one and the same bequest; the repetition being held, upon the view sanctioned by the

Presumption against duplication, where same legacy repeated in the same instrument.

(a) *Belshes v. Murray*, 1752, M. 11361. Prælegata); Lib. 33, Tit. 4, L. 1, § 14; Cod. (De legatis) Lib. 6, Tit. 37, L. 11.

(b) The passages cited from the text of the civil law were—Dig. (De legatis) Lib. 30, Tit. 1, L. 34, § 3; Lib. 31, Tit. 1, L. 22; Dig. (De Dote

(c) *Allen v. Callow*, 3 Ves. 289; *Osborne v. D. of Leeds*, 5 Ves. 369.

(d) *Lee v. Pain*, 4 Hare, 243.

civil law (a), to arise from forgetfulness (b). And slight differences in the form of the dispositions—as, for example, if the one legacy be to a wife simply, and the other destined to her separate use (c)—will not entitle the legatee to claim the benefit of a double bequest. On the other hand, if the legacies, though given by the same instrument, are of unequal amount, they will be considered accumulative; and it is immaterial whether the larger sum is given before or after the less (d).

But if the two legacies not *ejusdem generis*, both will be due.

In the Scotch cases upon double legacies given by the same instrument, the provisions have been for the most part of a different nature, *e.g.*, an annuity or liferent, and a legacy; in which case there can be no doubt that both would be due (e). In *Sutherland v. Sutherland's Executors* (f), the testator desired that after payment of his debts, the sum of L.200 should be laid out at interest, to be paid yearly to his reputed daughter; and that in case of her marrying with the consent of his executors, L.100 should be paid and secured as her portion. The Lord Ordinary held, that on payment of the marriage portion, the liferent ought to be restricted

(a) See Dig. Lib. 34, Tit. 1, L. 18, and Lib. 34, Tit. 4, L. 9.

(b) In one of the later cases (*Manning v. Thesiger*, 3 My. & K. 29) the principle is very distinctly brought out. The bequest was as follows:—"I give to my brother, C. T. of London, from and immediately after the decease of my husband, R. W., and in default of issue of our marriage, L.100 stg.; also to my said brother, C. T., an annuity of L.50 stg. for life, to commence from the day of the death of my husband, R. W., and such default of issue as aforesaid, and to be paid to him half-yearly; also to my brother, C. T., of or near the city of London, the sum of L.100 stg." Lord Cottenham was of opinion that the testatrix's brother was entitled to the annuity, and to one legacy only of L.100. See also *Brine v. Ferrier*, 7 Sim. 549; *Early v. Middleton*, 14 Beav. 453; *Early v. Benbow*, 2 Coll. 342; *Holford v. Wood*, 4 Ves. 76.

(c) *Greenwood v. Greenwood*, 1 Br.

Ch. Ca. 31; *Garth v. Meyrick*, 1 Br. Ch. Ca. 30.

(d) See *Currie v. Pile*, where a testator gave his son L.1000 absolutely, payable on his attaining majority; and after providing for his maintenance and education till he arrived at majority, added, "and then I give him L.5000." Lord Thurlow held that the son was entitled to L.6000 (2 Br. Ch. Ca. 225). See the subsequent cases in 2 Wh. & T. 297.

(e) See *Baird v. Jaap*, 18 D. 1246; and the cases of *M'Innes* and *Sutherland*, *infra*. In the first mentioned case, the testatrix gave a legacy in this form: "To Lord Dunfermline, L.2000, thousand pounds." This was held to be a legacy of L.2000, on the ground that the sum was plainly set down in figures, and the words that followed it did not affect it either in the way of increase or diminution.

(f) *Sutherland v. Sutherland's Exrs.*, 22 Nov. 1825, 4 S. 220.

to L.100; but the Court altered, and preferred the claimant to the liferent of L.200, along with the legacy of L.100.

The case which perhaps comes nearest to that of simple repetition in the same instrument, where substitution would be implied, is that of *M^rInnes v. M^rAlister* (a). The words of the bequest were, "I give and bequeath to each of my sisters, Susanna and Margaret, L.200 stg. each, with an additional sum of L.200 stg. to be given to Margaret, which, with the aforesaid L.200, is to be settled upon herself for life." The testator also burdened his heir with a legacy of L.100 a-year to his sister Margaret. Here the annuity was clearly additional, being a provision of a different nature from the legacies of capital, and also charged upon different property. The two legacies of L.200 were both due, because the one was expressed to be "additional" to the other; and it was so found by the judgment of the Court.

*M^rInnes v.
M^rAlister.*

2. There can be no doubt that where specific legacies of the same thing are bequeathed, whether in the same or in different instruments, it is a mere repetition; for of course the same subject cannot be twice given (b). And the operation of the principle has been extended by the Court of Session to the case of a demonstrative legacy; e.g., a legacy of a sum of money given for the purpose of purchasing an article of ornament (c), or a legacy of small sums of money to be given in the shape of clothing or coals, etc., to the poor (d).

Specific legacy
of same sub-
ject is neces-
sarily a repeti-
tion.

It was the opinion of the late Lord Justice-Clerk that extrinsic evidence as to the intention of the testator was in no case admissible, as there was no reason for making, in regard to such questions, an exception to the general rule, according to which the evidence of intention must arise on the face of the instrument. In England a distinction has been taken between the cases in which the Court raises the presumption against the intention of a double gift, and those in which the presumption is in favour of duplication. In the former class of cases, extrinsic evidence is admitted to rebut the

Whether ex-
trinsic evi-
dence admis-
sible in any
circumstances.

(a) *M^rInnes v. M^rAlister* (1st case), 29 June 1827, 5 S. 862. See the bequest quoted, 863, and the judgment of the Court, at 869 and 871, points 9 and 11.

Ridges v. Morrison, 1 Br. Ch. Ca. 392; *Suisse v. Lowther*, 2 Hare, 432.

(b) Per curiam in *Hooley v. Hatton*, 1 Br. Ch. Ca. 390; and see *D. of St Albans v. Beauclerk*, 2 Atk. 633;

(c) *Horsbrugh v. Horsbrugh* (5th point), 9 D. 329; see the President's opinion, 380.

(d) *Horsbrugh v. Horsbrugh*, ut supra (8th point); and see *Baird v. Jaap*, 18 D. 1246.

presumption against the reception of the words of bequest in their literal signification ; in the latter, such evidence is wholly excluded ; the principle being, that evidence is receivable in support of the writing, but not in contradiction to it (*a*). Extrinsic evidence is also admissible in England to show the circumstances of the testator at the time of making his will (*b*) ; and for this purpose extrinsic evidence would also appear to be admissible according to the rules of our own law (*c*).

Whether
second legacy
is liable to
conditions and
incidents of
the first.

With regard to the question, how far an additional or substitutionary legacy is liable to the conditions and incidents of the original legacy, or to the destination impressed upon it, no very distinct authority is to be found in our reports. It is clear from the actual result of the decisions, that ulterior destinations will not be implied in additional legacies (*d*) ; but as to conditions, there is more reason for presuming an intention that they should continue in operation until expressly revoked (*e*). In England the rule appears to be that an additional legacy, whether substitutionary or accumulative, will, unless a contrary intention is manifested, be affected by the conditions of the prior legacy ; but that a legacy given as a new and independent bequest, *e.g.*, if the prior legacy have been expressly revoked, is not affected by such conditions ; and that in no case is the later gift bound by the ulterior destinations impressed upon the prior gift (*f*).

(*a*) Per Sir John Leech, *Hurst v. Beech*, 5 Madd. 351 ; *Lee v. Pain*, 4 Hare, 216, per Wigram, V. C. ; *Paul v. Hill*, 1 D. & War. 116, decided by Lord Chancellor Sugden.

(*b*) *Martin v. Drinkwater*, 2 Beav. 215 ; *Guy v. Sharp*, 1 My. & K. 589.

(*c*) See *Robertson v. Duff*, 14 Jan. 1840, 2 D. 279 ; and Dickson, Evid. § 179 *et seq.*

(*d*) *Lindsay v. Anstruther's Trs.*, 6

Feb. 1827, 5 S. 297 ; *Straton's Trs. v. Cunningham*, 10 Mar. 1840, 2 D. 820 ; see, however, *Horsbrugh v. Horsbrugh* (2d point), 10 D. 824, and *Murray v. Smith*, 2 Feb. 1831, 9 S. 378,—a special case.

(*e*) *Harvey v. Harvey's Trs.*, 28 June 1860, 22 D. 1310.

(*f*) See Wh. & T.'s *Leading Cases*, p. 301, where the decisions are referred to.

CHAPTER XL.

OF THE SATISFACTION AND DISCHARGE OF LEGAL CLAIMS.

IN this chapter we have to deal with some of the most intricate and perplexing questions which arise out of, or have relation to, double claims against the trust estate at the instance of the same parties,—those, namely, which involve the compatibility of legal with conventional claims. With the subject of the repetition of legacies, discussed in the last chapter, we have completed the investigation of the law of legacies considered *per se*. The present chapter introduces the conflicting element of legal claims. In our next we shall go on to consider the ademption of legacies, including the doctrine of the satisfaction of onerous by gratuitous provisions, as well as the question, under what circumstances a legacy can be held to be satisfied by a subsequent onerous provision.

The investigation of the legal order of succession, and the rights which the law accords to the heir of inheritance, the widow, and the children of the family, does not belong to the subject we have undertaken to illustrate. There remains, however, the question of the power of the testator to defeat the legal provisions, or so to frame his settlement as that the objects of his bounty shall be precluded from disturbing the dispositions of his estate by laying claim to those provisions. As the interests of beneficiaries are liable to be diminished or enhanced by the addition or subtraction of legal claims from the fund available for division, it is essential to a complete view of the beneficial interest that we should take note of the manner in which legal claims may be satisfied or discharged.

Division of the
subject.

SECTION I.

SATISFACTION AND DISCHARGE OF LEGITIM.

Importance of the doctrine of satisfaction in relation to legitim.

We shall begin with the subject of legitim, because the rules which regulate the discharge and satisfaction of that interest are better understood and more precisely ascertained than is the case with the other legal claims. A clear perception of the operation of the doctrine of satisfaction upon legitim, will greatly facilitate the exposition of the same principle as applied to *jus relictæ*, terce, courtesy, executry, and the right of inheritance. In fact, it will only be necessary, in treating of other legal claims, to point out the distinctions depending on the nature of the claim, which control the application of those general rules that have been developed by the course of the decisions in relation to legitim.

How legitim may be either discharged or satisfied.

The right of the individual member of a family may be extinguished in various ways. It may be expressly discharged by (1) the declaration of his parents in their ante-nuptial contract, (2) by his own deed; it may be satisfied by (3) acceptance of a testamentary provision declared to be in lieu of legitim, or (4) by acceptance of a provision under a general settlement which disposes of the legitim fund; (5) it may be extinguished wholly or partially when the claimant, being heir-at-law to his father, succeeds to the heritable estate, in consequence of the younger children's right to require the heir to collate; or (6) it may be satisfied or compensated by advances made to the claimant by the father in his lifetime, which are imputed to account of legitim by the operation of the doctrine of *collatio bonorum inter liberos*.

Express discharge, where Father has married without a contract.

1 & 2. In practice, express discharges of legitim only occur in marriage-contracts. Unless the father has married without a contract, there is no necessity for a subsequent discharge; as ante-nuptial contracts invariably exclude the legitim, and such exclusion is held to be equivalent to an onerous discharge of the right, provided a certain sum, however small, is given in lieu of it (a). The exclusion must be made applicable in express terms to the person, as

(a) Ersk. 3, 9, 23; Bankt. 3, 8, 25; Bell's Pr. § 1587; *Maitland v. Maitland*, 14 Dec. 1843, 6 D. 244.

well as the right. The word legitim is the most proper to denote the right, though "portion natural" and "bairn's part," which are associated with it in the ordinary style of marriage-contracts, would probably be held sufficiently expressive of the intention (*a*). Since the decision in the case of *Keith's Trs.* (*b*), it may be assumed that "children of the marriage" is the expression most properly descriptive of the persons, where the intention is to exclude the heir as well as the younger children (*c*).

Further, an ante-nuptial contract has the effect of constructively discharging the legitim, when by its provisions the *universitas* of the parents' moveable estate is settled upon the children of the marriage absolutely or subject to a power of division, express or implied (*d*); or upon the wife in liferent and the children of the marriage in fee (*e*); or even upon the wife in fee-simple: for until marriage every man has the uncontrolled power of disposition of his whole fortune; and if he settle it all upon his intended wife by an *onerous* act—which an ante-nuptial provision to the wife is—there remains no free fund from which legitim can be claimed (*f*). Legitim, it is scarcely necessary to add, cannot be extinguished or diminished by a bequest, *mortis causa* donation, or trust conveyance of the estate to another child, and still less to a stranger (*g*).

Discharge by ante-nuptial contract disposing of the entire succession.

Express discharge by the child occurs in practice when a parent who has not discharged his children's legitim on the occasion of his own marriage, becomes a party to the marriage-contract of one of his children as granter of a provision, which may either be in the

Discharge when parent becomes a party to the child's marriage-contract.

(*a*) *Breadalbane Trs. v. Marchioness of Chandos*, 16 Aug. 1836, 2 S. & M'L. 377, affg. 14 S. 309.

(*b*) *Keith's Trs. v. Keith*, 19 D. 1040; see also *Mailand v. Mailand*, *supra*.

(*c*) It is a serious mistake, and one that has occasioned great hardship to families, to exclude the legitim of the younger children only. The effect of this mistake is to give the heir an indefeasible right to one-third of the moveable succession (*Panmure v. Crokat*, 22 Nov. 1854, 17 D. 85).

(*d*) *Home v. Watson*, 1757, 5 Br. Sup. 330, overruling the principle laid down in *Stirling v. Luke*, 1732, 1

Cr. & St. 215, and *Burden v. Smith*, 1738, 1 Cr. & St. 214.

(*e*) *Fisher's Trs. v. Fisher*, 19 Nov. 1844, 7 D. 129. See *Laurie v. Edmond's Trs.*, Hume, 291.

(*f*) Per curiam in *Fisher's Trs.*, *supra*. A partial settlement of the conquest by ante-nuptial contract, upon the children of the marriage, does not of course imply an exclusion of legitim as to the remainder (*Nisbet v. Nisbet*, 1726, Robertson, 594).

(*g*) *Lashley v. Hog*, 12 July 1804, 4 Paton, 581 (5th point); see Lord Eldon's speech reported at great length, p. 603. The older cases on this point are noted in Fraser, I. 551.

form of a present payment or of a postponed obligation; and declares that the provision is to be in satisfaction of legitim. The acceptance of the provision is sufficiently signified by the child's subscription of the contract, which is in effect a discharge *inter vivos* of legitim. We have already observed, that a discharge of legitim is not to be implied (a); a rule which is illustrated by one of the points in the Breadalbane succession case. One of the daughters of the Marquis, by her marriage-settlement in the English form, accepted a sum secured to her "as her *portion* or fortune." This was maintained to be equivalent to a discharge of legitim; but it was found by the concurring decisions of the Court of Session and House of Lords, that the right to the *portio legitima* was not passed by a form of expression which wants the significant part of the legal term (b).

Exclusion of
the legitim by
election to take
under a will.

3 & 4. The exclusion of the right to legitim by ante-nuptial contract, or discharge executed in the lifetime of the father, is sometimes termed "foris-familiation." In either case it operates in favour of the other children of the marriage whose right to legitim has not been so excluded (c), in the same way as if the child had died during the lifetime of the father, and therefore before the right vested (d). Where, on the other hand, the right to a share of legitim is forfeited in consequence of the child electing to take his provisions under a testamentary deed which disposes of the legitim, the benefit of the share, which, if claimed, must have come out of the residuary fund, enures to that fund (e). The principle of the distinction was thus stated by Lord President M'Neill (f): "When the father, by transaction in his lifetime, extinguishes the claim for legitim which his child would, in the event of survivance, have been entitled to make against the succession, the effect of that

(a) Stair, 3, 8, 45; Ersk. 3, 9, 23; *Wright's Trs. v. Wright*, 27 Jan. 1835, and cases there cited; *Breadalbane* case, *infra*.

(b) *Breadalbane Trs. v. Marchioness of Chandos*, 16 Aug. 1836, 2 S. & M'L. 377, affg. 14 S. 309.

(c) *Hog v. Lashley*, 7 May 1792, 3 Paton, 247, where the legitim was discharged by the children in consideration of an immediate payment; and *Baron Panmure v. Crokatt*, 29 Feb.

1856, 18 D. 703, where it was excluded by ante-nuptial contract, in consideration of provisions payable after the father's death.

(d) That the right to legitim vests by survivance was authoritatively fixed by *M'Murray*, 17 July 1852, 14 D. 1048, and *Macdougall v. Wilson*, 20 Feb. 1858, 20 D. 658.

(e) *Fisher's Trs. v. Dixon*, 6 Apr. 1843, 2 Bell, 63, affg. 2 D. 1121.

(f) Lord Colonsay, 18 D. 709.

transaction is to relieve *the succession* from the eventual claim of that child, just as if the child had died, or been foris-familiated. That relief to the succession is what the father acquires by the transaction; but the succession so relieved becomes, on the death of the father, subject to the operation of the law, and must undergo the division which the law has appointed in regard to the moveable estate and succession of every man. Whereas, when no transaction binding on the child has taken place during the father's lifetime, and when by the father's death the right to legitim has opened to and become fully vested in the child, and such child agrees to take in lieu thereof a provision which the father had put in his option,—that is a transaction, not with the father, but with the representatives, who in that way satisfy the claim, and are entitled to the benefit of the relief so obtained." If the legitim of all the children is discharged during the lifetime of the parent, the legitim fund is necessarily extinguished, and the succession is then divisible in equal shares between the widow and next of kin.

The doctrine, that the acceptance of a provision under a total settlement operates in satisfaction of legitim, is now so well established, that it is unnecessary to refer in detail to the cases (a). A total settlement is in effect a disposition of the legitim; and the legatee must therefore elect between his rights under the settlement, and his legal claims. As to the effect of election upon the rights of other beneficiaries, reference is made to the subsequent chapter upon Election (b).

Acceptance of provision under a total settlement equivalent to election.

It has been laid down, however, on high authority, that the acceptance of a legacy or special provision under a partial settlement of moveable estate, does not preclude the legatee from claiming his legitim (c). It was ruled by a unanimous judgment of the Second Division in a recent case (d), where the father of a

Appointment of a universal Legatee does not affect legitim or *jus relictæ*.

(a) See the following cases among many others, which illustrate the principle:—*Breadalbane Trs. v. Duchess of Buckingham*, 5 Mar. 1840, 2 D. 731; *Nicolson's As. v. Macalister's Trs.*, 2 Mar. 1841, 3 D. 675; *Minto v. Kirkpatrick*, 20 May 1842, 4 D. 1224; *Wilson's Trs. v. Wilson*, 1 July 1843, 15 Scot. Jur. 549; *Collier v. Collier*, 6 July 1833, 11 S. 913, &

F. C.; *Henderson v. Henderson*, 1782, M. 8191.

(b) Chapter XLII.; see p. 324.

(c) *Collier v. Collier*, *ut supra*, per Lord Glenlee; *Howden v. Howden*, cited in note to Faculty Report of *Howden's* case; *Henderson v. Henderson*, *ut supra*, decree.

(d) *White v. Finlay*, 15 Nov. 1861, 24 D. 38.

family appointed his widow "sole executrix and universal legatee," that the testament, although operative as a conveyance of the entire *legal estate* for the purposes of administration, disposed of the *beneficial* interest in the dead's part alone; insomuch that the children, after executing a ratification of the testament, were entitled to legitim in competition with the trustee on the executrix's estate. It follows, therefore, that where a universal legacy of the moveable estate is given to one child, under burden of provisions to the other children, legitim may be claimed by the general legatees in addition to their provisions. A provision of heritage will not be presumed to be in satisfaction of legitim (a).

Compensation
of claim to
legitim. Col-
lation.

Collation be-
tween Heir
and Executor.

5 & 6. The right to legitim may be extinguished or compensated where the other children meet the claim by the counter claim of "collation," directed either against the heritable estate to which the child sustaining the character of heir-at-law has succeeded, or against moveable funds advanced to the child by the parent during his lifetime. Collation as between heir and executor, we may remind the reader—though we do not profess to enter fully into the nature of legal claims—extends to property to which the heir succeeds by singular titles, *e.g.*, entailed estate, provided he is heir *alioqui successurus* (b). That it operates practically in the way of compensation, is evident from the import of the two leading modern cases, *Anstruther v. Anstruther*, and *Fisher's Trustees v. Fisher* (c). In the former case, the heir, who succeeded to the estate in virtue of an entail executed by an ancestor of his father, could not convey the fee to the younger children; but nevertheless *they* were held entitled to impute the value of his life interest in the estate in extinction of the share of succession payable to him. In the latter case, it was expressly found that the heir was not bound to execute a *pro indiviso* conveyance of the heritable estate in favour of the family; but that it was competent and sufficient to have the value of the estate ascertained, with the view of imputing it in part payment of the eldest son's share of the entire succession (d).

(a) *Howden v. Crighton*, 18 May 1821, 1 S. 14; *Marshall v. Marshall's Trs.*, 21 Nov. 1829, 8 S. 110.

(b) *Anstruther v. Anstruther*, 20 Jan. 1836, 14 S. 272.

(c) *Anstruther's case, supra*; *Fisher's Trs. v. Fisher*, 5 Dec. 1850, 13 D. 245.

(d) *Fisher's Trs. v. Fisher*, decree, 13 D. 261.

We do not purpose to enter minutely into the law of *collatio bonorum inter liberos* any more than with regard to collation between heir and executor. The object of collation between children is to secure an equitable division of the legitim fund. The origin of the doctrine is traced by Mr Fraser to the civil law (a). The principle, as stated by Erskine (b), is, that all provisions given by a father to his children during his lifetime are imputed in satisfaction of legitim, including not only the tocher given on his child's marriage, but sums of money advanced, though without any written acknowledgment or obligation to account. "Advances," says Professor Bell (c), "will be imputed to the legitim in the following circumstances:—if made for the purpose of setting the child up in trade, or for a settlement in the world, or for a marriage portion." In conformity with this principle, it was held, in *Johnston v. Cochran* (d), that a daughter who had received L.500 as a marriage portion from her father, and in *Kay v. Kay* (e), that a son to whom advances had been made to establish him in business, were bound to impute these provisions, with interest, in satisfaction of legitim. The exceptions are,—(1.) Advances intended as a recompense for services rendered (f); (2.) advances for maintenance and education in minority, or prior to emancipation, and which are due *ex debito naturali* (g); and (3.) advances made in loan, and for which the child was liable in repayment to the father and his executors (h). In short, collation applies to provisions as distinguished from payments under obediencial obligations, or on the footing of contract.

(a) 1 Fraser, 571.

(b) Ersk. 3, 9, 24 & 25.

(c) Bell's Pr. § 1588. As advances made *inter vivos* out of the revenues of heritable property do not tend to diminish the legitim fund, they do not fall to be collated (Ersk. *ut supra*; *Marshall v. Marshall's Trs.*, 21 Nov. 1829, 8 S. 110).

(d) *Johnston v. Cochran*, 13 Jan. 1829, 7 S. 114; see *Nicolson's Tr. v. Macalister*, 2 Mar. 1841, 3 D. 675. See Cod. Lib. 6, Tit. 20, L. 17, & 20, Pr. & § 1; Cod. Lib. 3, Tit. 28, L. 29, & 30, § 2.

(e) *Kay v. Kay*, 12 July 1844, 16 Scot. Jur. 550; *Campbell v. Anstruther*,

16 June 1837, F. C.; *Duke of Buccleugh v. M. of Tweeddale*, 1677, M. 2369. See *Nisbet v. Nisbet*, Rob. Ap. Ca. 594.

(f) See *Minto v. Kirkpatrick*, 23 May 1833, 11 S. 632, where it was decided that a son taken into partnership with his father is not bound to collate the value of the share in the stock in trade assigned to him. See *Gunn v. Gunn's Trs.*, 28 Feb. 1833, 11 S. 484.

(g) *Irving v. Irving*, 1694, 4 Br. Sup. 144. See *Stair*, 3, 8, 26.

(h) *Webster v. Rettie*, 4 June 1859, 21 D. 915.

Collatio bonorum inter liberos.

Reduction of conveyances in defraud of legitim.

The right of collation must not be confounded with the right which every child has to reduce conveyances *inter vivos* not completed by possession, as being in defraud of legitim (a).

SECTION II.

SATISFACTION AND DISCHARGE OF *JUS RELICTÆ*.

Limits of the subject.

Jus relictæ, like legitim, may be either discharged by agreement, or satisfied by acceptance of an equivalent provision. There does not seem to be, in relation to this particular claim, any room for the application of the doctrine of satisfaction by advances. As the husband is legally bound to maintain his wife during the subsistence of the marriage, the presumption is, that monies advanced to her during his lifetime must have been given in fulfilment of the husband's obligation to maintain her, and not as a provision for future support. Our remark does not apply to funds settled by way of post-nuptial provision. Such provisions are subject to similar rules of interpretation as ante-nuptial provisions, and, as will be seen, are in certain cases held to be given in satisfaction of legal provisions (b).

Express discharge of *jus relictæ* by ante-nuptial contract.

1. A discharge of *jus relictæ* may be either express or implied; in consideration of a provision, or of the onerous obligation implied in marriage. It does not seem to be correct to say that *jus relictæ* may be gratuitously discharged; for a discharge by ante-nuptial contract, although it were granted without a pecuniary equivalent—which in practice is never done—is, in contemplation of law, an onerous discharge; and a discharge granted after marriage, without consideration, is not binding.

To render discharge effectual, "*jus relictæ*" must be named.

As we had occasion to remark with reference to legitim, the right intended to be discharged ought to be described by its proper name (c). A widow to whom an annuity had been provided in her ante-nuptial settlement in the English form, which annuity she accepted "in lieu and full bar and satisfaction of the dower or thirds, which at common law or by custom she can or otherwise

(a) *Hog v. Lashley*, 7 May 1792, 3 Paton, 247; *Johnston v. Johnston*, 23 June 1814, Hume, 290; *Balmain v. Graham*, 1721, M. 8199.

(b) The fact that such donations are

revocable during life, does not interfere with the application of the principle under consideration.

(c) See Erskine, 3, 9, 16; 1 Fraser, 519.

might claim from the estates of her husband," and also "in full bar and satisfaction of terce," was held not to have discharged her *jus relictæ* under that expression, but to be entitled to claim it in addition to the provisions settled upon her by the contract (a). It had previously been held that a general discharge, as of "any aliment or other provision of the law competent to her as a wife" (b), or of "all that she or her next of kin could claim in the event of her predecease" (c), was sufficiently broad to comprehend *jus relictæ*.

Again, *jus relictæ*, equally with legitim, may be constructively discharged during the subsistence of the marriage, by acceptance of a provision under a contract or settlement, under which the husband disposes of the fund which is subject to the widow's right,—that is, under a settlement dealing with the totality of the moveable succession (d). Simple acceptance of a provision *inter vivos*, however large, does not bar the right to claim *jus relictæ* out of the husband's undisposed-of estate (e). This rule has been applied to provisions of every description, including simple money provisions (f), settlements of conquest (g), annuities (h), and provisions of heritage (i).

Constructive discharge by acceptance of a provision payable out of the entire estate.

In the case of *Thomson v. Smith* (k), the question was raised, whether the acceptance of a liferent of the husband's whole estate implied a discharge of *jus relictæ*. The negative was pleaded in answer to a claim by the husband's representatives against the

Whether discharge implied from acceptance of a liferent of the Husband's whole estate.

(a) *Keith's Trs. v. Keith*, 17 July 1857, 19 D. 1040. See *infra*, p. 290, as to the extent to which *jus relictæ* is compatible with the acceptance of testamentary provisions.

(b) *Miller v. Broun*, 1776, M. 6456; 5 Br. Sup. 473; Hailes, 678.

(c) *Tod v. Wemyss*, 1770, M. 6451 and see *Ersk. ut supra*, & Bank. 3, 8, 34 & 36. The form of expression last quoted in the text would seem to be applicable *in terminis* only to the wife's share of the goods in communion, which, prior to the Moveable Succession Act, she was entitled to bequeath.

(d) See the cases as to legitim, *supra*.

(e) *Keith's Trs. v. Keith*, *supra*, and cases noted below.

(f) *Howden v. Crichton*, 18 May

1821, 1 S. 14; see note to Faculty Report, *Collier v. Collier*, 6 July 1833; *Fraser v. Rankine*, 17 Dec. 1835, 14 S. 174; *M'Aulay v. Bell*, 1712, M. 3848.

(g) *Tod v. Wemyss*, 1770, M. 6451; Hailes, 384.

(h) *Ross v. Masson*, 3 Feb. 1843, 5 D. 483.

(i) *Cross v. Boyes*, 16 Jan. 1801, Hume, 484. It is obvious that even a universal legacy of *heritage* has no effect upon the rights of the heirs *in mobilibus* (*Urquhart v. Urquhart*, 20 Feb. 1851, 13 D. 742).

(k) *Thomson v. Smith*, 8 Dec. 1849, 12 D. 276. See *Leighton v. Russell*, 1 Dec. 1852, 15 D. 126.

widow; but it was held, that as all parties had acquiesced in a distribution of the estate upon a different footing, the representatives were barred from making any further claim. Consequently the point was not decided. Lord Moncreiff observed that it was a debateable question, whether *jus relictæ* was merged in a disposition of an entire liferent of all that the husband had. The case of *Cross* (a) came very near to that point; and the cases referred to by Mr Fraser seemed to support the proposition, that where the wife had been a party to a deed or mutual contract, whereby she accepted of a liferent of the whole or a portion (b) of the funds, a discharge of her own share might be legally implied (c).

Satisfaction of
jus relictæ by
testamentary
provisions.

2. The *jus relictæ* will be satisfied by a testamentary provision in favour of the wife, and declared to be in satisfaction of *jus relictæ*, either directly, or by being made part of a general settlement under which the husband disposes of the totality of the moveable estate. And it is immaterial that the wife's provision is contained in a separate writing, if such writing form part of a total settlement (d). The leading case is *Keith's Trustees v. Keith* (e), where the distinction was taken between marriage-contract and testamentary provisions granted by the same settlor. The former was considered not to be in satisfaction of *jus relictæ*, because it was not given under that condition, and the contract did not dispose of the settlor's whole estate; the latter formed part of a universal settlement. The wife was therefore held bound to elect between the testamentary provisions in her favour, and the *jus relictæ*, increased by her marriage-contract provision.

Effect of
discharge or
satisfaction in

We refer to the chapter on Election with reference to the question as to the effect of a discharge or satisfaction upon the rights

(a) *Cross v. Boyes*, *supra*.

(b) It is clear that a bequest of a portion of the moveable estate would not imply a discharge of legal claims (see *Keith's Trs. v. Keith*, and other cases cited above).

(c) 12 D. 282. The cases here referred to are, *Riddell v. Dalton*, 1781, M. 6457; *Tod v. Wemyss*, *supra*; *Holmes v. Marshall*, 1677, M. 6448, 3 Br. Sup. 116; *Menzies v. Burnett*, 1666, M. 6448, 1 Br. Sup. 543; *Young*

v. Buchanan, 1669, M. 6447. The last case is referred to by Fraser (I. 594) as authoritative. See also *Milne v. Farquharson*, 5 Dec. 1822, 2 S. 66; Ersk. 3, 3, 30.

(d) *Stewart v. Stephen*, 29 Nov. 1832, 11 S. 139.

(e) *Keith's Trs. v. Keith*, 17 July 1857, 19 D. 1040; see *Bennet v. Bennet's Trs.*, 1 July 1829, 7 S. 817; *Johnstone v. Coldstream*, 30 June 1843, 5 D. 1297.

of other claimants under the succession (a). The principle is, that a discharge extinguishes the right altogether, so that the moveable succession becomes divisible in equal shares between children entitled to legitim, and the testator's representatives. Acceptance of a testamentary provision in satisfaction of *jus relictæ*, that is, acceptance after the husband's death, is understood to operate in favour of the representatives alone (b).

enlarging the interests of other claimants.

SECTION III.

SATISFACTION AND DISCHARGE OF TERCE AND COURTESY.

Terce and courtesy, like other legal claims, may be made the subject of discharge or satisfaction.

The interest of either of the spouses in the property of the other may be renounced simpliciter by ante-nuptial contract (c); and even after marriage these rights may be discharged for an equivalent provision, subject to the qualification, however, that if the consideration in a post-nuptial contract is inadequate, the discharge may be revoked (d). Terce and courtesy are of course liable to be affected by the diminution or conversion of the estate which forms the subject of these rights; but into this matter, which relates to the nature of the interest, and not to its effect in competition with beneficial interests, we do not enter.

How these rights may be satisfied or discharged.

With reference to the doctrine of satisfaction, it is necessary to distinguish between terce and courtesy. In the former case, the doctrine rests upon the provisions of the Scottish statute 1681, chapter 10, which enacts "that in time coming, where there shall be a particular provision granted by an husband in favours of his wife, either in a contract of marriage or some other writ, before or after the marriage, that the wife shall be thereby secluded from a terce out of any lands or annualrents belonging to her husband, unless it be expressly provided in the contract of marriage, or other

Exclusion of the terce under Statute 1681, c. 10.

(a) *Infra*, p. 327.

(c) See *Hamilton v. Boswell*, 8 Feb. 1720, Robertson, 346.

(b) Compare *Andrews v. Sawyer*, 2 Mar. 1836, 14 S. 589, with *Fisher v. Dixon*, 2 Bell, 75, 78; and *Campbell's Trs.*, 11 July 1862.

(d) Chapter XXXV. (Marriage-Contracts, p. 205). See *Mowat's Crs. v. Lauder*, 1697, M. 6895.

writ containing the said provision, that the wife shall have right to a terce, by and attour the particular provision conceived in her favours."

Distinction in reference to courtesy.

In the case of the courtesy, the right is not excluded by a conventional provision, unless accepted subject to a declaration that it is in lieu of courtesy (a). It is doubtful whether the acceptance even of a *mortis causa* provision, forming part of a universal conveyance of the wife's heritable estate, would deprive the husband of courtesy, unless the *jus mariti* and right of administration were excluded; for the right to the courtesy is merely a continuation of the *jus mariti* after the death of the wife, and not strictly a right of succession (b); and it is not to be presumed that a proprietrix, in disposing of her estate, means to dispose of her husband's vested interest in it. However, it may be assumed that a trust for *immediate* division, giving a portion of the estate to the husband in lieu of his liferent, would put him to his election.

Acceptance of the special provision is necessary to accomplish the exclusion of terce.

Although by the terms of the statute 1681, c. 10, terce is excluded by any provision *granted* by the husband, it has been held, as an equitable construction of the enactment would require, that the wife's acceptance is necessary to an effectual exclusion. If she has not accepted the conventional provision *stante matrimonio*, her right of election at the husband's death is indisputable (c). And infetment of the wife in the fee of part of the estate, without her consent, will not deprive her of her right to elect (d).

Satisfaction of terce by conventional provision under foreign settlement.

Whether terce is satisfied by a conventional provision under a foreign settlement, depends upon the question, whether that provision is effectual and binding according to the law of the country in which it is made. The acceptance of a sum of money as a jointure under an English settlement, has been held sufficient to bar the right of terce (e). On the other hand, where the conventional provision included the liferent of the price of the granter's Scotch estate, which, by the form of the deed, was not effectually con-

(a) See Bell's Com. (5th Ed.) I. 636; 1 Fraser, 642; *Primrose v. Crawford*, 1771, M. Courtesy, No. 1; *Hamilton v. Boswell*, *supra*. 15 Dec. 1830, 9 D. 188; *Douglas, Heron, & Co. v. Cant*, 1783, M. 15866 and 11461.

(b) Ersk. Pr. 2, 9, 31; Bell's Com. (5th Ed.) I. 61-2; 1 Fraser, 637.

(c) Stair, 2, 6, 17; *Cowan v. Kerr*,

(d) *Belschier v. Moffat*, 1779, M. 15863.

(e) *Countess of Seafield v. the Earl*, 8 Feb. 1814, F.C.

veyed to her, the Court found the widow entitled to terce, on the principle that she had not succeeded to the full measure of the conventional provision intended for her (*a*). In a more recent case, where a wife, by a contract of separation executed in America, received from the husband an annuity of L.300 per annum, and afterwards received from the Court of Chancery of South Carolina a sum in name of alimony of 20,000 dollars, the terce was held not to be satisfied by the settlement of the annuity, as it was evident from the judicial proceedings which had since taken place that the previous arrangement was only temporary (*b*).

SECTION IV.

SATISFACTION AND DISCHARGE OF EXECUTRY AND HERITABLE SUCCESSION (*c*).

Notwithstanding some observations by Mr Fraser of a contrary tendency (*d*), it is more than doubtful whether the right to undisposed-of executry can be cut off by a discharge, or satisfied by a special provision. The passages in Stair and Erskine which have been supposed to countenance the proposition (*e*) seem rather to imply that the right will subsist, unless it is either defeated by a conveyance of the dead's part to some other person, or by an express renunciation on the part of the child himself in favour of the

Quære, whether right to undisposed-of moveable succession can be discharged.

(*a*) *Jankouska v. Anderson*, 1791, M. 6457; and see *Ross v. Aglionby*, 1797, M. 4631, and "Foreign," No. 5.

(*b*) *Nisbett v. Nisbett's Trs.*, 24 Feb. 1835, 13 S. 517.

(*c*) The right of the children to claim from the father's estate the share of the goods in communion which might have been bequeathed by their deceased mother, has been abolished by the Moveable Succession Act (18 & 19 Vict. c. 23, § 6), and we have thought it unnecessary to treat in a separate section of the satisfaction of this claim. The law is stated by Mr Fraser, vol. i., pp. 595-599. The latest case that has

occurred is *Sinclair's Exrs. v. Rorison* (11 Dec. 1852, 15 D. 212), where a father having settled L.800 upon his daughter in liferent, and her children in fee, adding that he included her mother's share in that sum, and the daughter having repudiated the settlement, it was held, that the value of the deceased wife's share of executry must be deducted, in accordance with the declaration in the will. *Leighton v. Russell*, 1 Dec. 1852, 15 D. 126, decided that a liferent of *universitas* unaccepted, did not bar the claim of the wife's executors.

(*d*) 1 Fraser, 600

(*e*) Stair, 3, 8, 54; Ersk. 3, 9, 23.

other members of the family. The principle that an heir cannot be excluded from the succession by disinherison, has been given effect to in several cases relating to heritable succession (a); and although it was held in an old case that a beneficial interest might be given to testamentary executors by a simple nomination, coupled with words excluding the testator's next of kin (b), there is no authority for holding that the interest of a child in his father's intestate succession can be taken away by words of mere exclusion, whether occurring in a marriage-contract or a testament.

Tendency
of the later
authorities.

The cases of *Maitland* and *Wilson v. Gibson* (c) are direct authorities to the contrary. In the latter case, the father had, by two testamentary dispositions in favour of his daughters, given to each of them a liferent interest in certain heritable property, and the fee to their children, and declared in both cases that the conveyance should be accepted "in full satisfaction of all legitim, portion natural, bairn's part of gear, *executry*, or other claims whatsoever which she or her heirs can ask or demand through my death or the death of my deceased wife, or in any other manner of way; and that in case recourse shall be had to any of the said claims, whether legal or conventional, the rights of both liferent and fee hereby granted shall fall and become null and void." He died intestate as to his moveable property, leaving a widow, who was separately provided for, her legal claims having been discharged. The Court held that the daughters were entitled to the entire moveable succession in equal shares. This case disposes of the theory of satisfaction as applied to *executry*. In *Maitland v. Maitland* (d), the interest of the children of the marriage in legitim and *executry* was excluded by ante-nuptial contract; and in this case also, the widow having predeceased her husband, the children of the marriage were held entitled to the entire succession. Although the ratio of these decisions is not very apparent from the reports, it is impossible to doubt as to the true principle applicable to such cases, which is, that an heir can only be excluded by a conveyance adverse to his right.

Maitland v.
Maitland.

(a) *Blackwood v. Dykes*, 26 Feb. 1833, 11 S. 443; *Sinclair v. Traill*, 27 Feb. 1840, 2 D. 694; *Stoddart v. Thomson*, 1734, Elch. "Succession," No. 1.
(b) *Beizley v. Napier*, 1739, M. 6591.
(c) *Wilson v. Gibson*, 30 June 1840, 2 D. 1236.
(d) *Maitland v. Maitland*, 14 Dec. 1843, 6 D. 244.

It has been settled, however, that a child may renounce his right to executry to the extent of devolving it upon his brothers and sisters, in the event of intestacy (a). But it would seem that such a renunciation will not operate in favour of more distant relatives (b). And such renunciation must in express terms apply to executry; for a discharge of legitim coupled with such general words as "all he can ask or demand," etc., do not apply to executry, which is not a claim to be demanded, but a right of succession (c).

Discharge of right to executry is operative in favour of Brothers and Sisters.

In conclusion, it is to be observed that the heir's right to a share of executry is held to be satisfied if he takes the heritable succession, in virtue of the doctrine of collation, which has been discussed with reference to legitim (d). *Collatio inter liberos* does not affect the executry, for gratuitous advances cannot be recovered by the donor's representatives; but the share of executry of any child is subject to deduction in respect of debts due by him to the father, including sums advanced in loan and entered as debts in the father's books (e).

Collation between Heir and Executor.

(a) *Johnston v. Miller*, 26 June 1847, 9 D. 1389; *Campbell v. Campbell*, 1738, Elchies, "Legitim," No. 4; M. 8187 and 9265; *Wright v. Burns*, 27 Jan. 1835, 18 S. 326.

(b) *Ersk. ut supra*; Bankt. 3, 8, 20 and 21; 1 *Fraser*, 601, and cases there referred to; *Campbell v. Campbell*, 1738, M. 8187, 9265; Elchies, "Legitim," No. 4.

(c) *Sinclair v. Sinclair*, 1768, M. 8188; *Anderson v. Anderson*, 1743,

M. 5054; *Hepburn v. Hepburn*, M. 5056; Elchies, "Executor," No. 12; *Pringle v. Pringle*, 1741, Elchies, "Legitim," No. 5; and cases in *Morrison*, voce "General Discharge," p. 5046 *et seq.*

(d) *Supra*, p. 286; and see *Stair*, 3, 8, 49; *Ersk.* 3, 9, 3 and 19; *Bell's Prin.* § 1910.

(e) *Webster v. Rettie*, 4 June 1859, 21 D. 915.

CHAPTER XLI.

OF THE SATISFACTION OR ADEPTION OF
LEGACIES AND PROVISIONS (a).

Doctrine of
satisfaction
defined.

THE doctrine of satisfaction which is discussed in this and the following chapter, has been defined to be the donation of a thing, with the intention, either expressed or implied, that it is to be taken, either wholly or in part, in extinguishment of some prior claim of the donee (b). In some of the classes of cases which we shall have occasion to consider, a legal presumption for satisfaction arises from the mere circumstance of a provision having been granted to a party for whom the granter was under an obligation to provide—a presumption which is expressed in the maxim, *debitor non præsumitur donare*. In another class of cases satisfaction is not presumed, and it lies upon the truster's representatives to show that his intention was to satisfy or adeem the prior provision. We have already had occasion to notice that the English cases, to the authority of which so much weight has justly been accorded in questions as to the law of *legacies*, offer but a very uncertain, and sometimes a misleading light, when we come to deal with the subject of provisions. The present chapter is wholly based upon native authority.

Division of the
subject.

The topics to be considered in the present chapter are, *first*, the satisfaction of legacies by subsequent marriage-contract provisions; *secondly*, the satisfaction of provisions by legacies; *thirdly*, the satisfaction of debts by legacies; and *fourthly*, the satisfaction of legacies by advances.

(a) The term *ademption*, which was used in the civil law to denote the implied revocation of legacies, has in England been employed in a more restricted sense to express the satisfaction of one provision by a subsequent provision of a different nature; e.g., the satisfaction of a legacy by a marriage

portion, or the satisfaction of a debt or portion by a legacy. In that sense it has lately come into use in Scotch practice. See *Kippen v. Darley*, cited *infra*; Inst. 2, 21, *de ademptione legatorum*; Dig. Lib. 34, Tit. 4, *de adimendis vel transferendis legatis*.

(b) 2 Wh. & T. L. C. 321.

SECTION I.

SATISFACTION OF LEGACIES BY PROVISIONS.

If a father gives the same amount of money to a child by two different instruments, unless it appears, either expressly or by necessary implication, that he intended the one to be in satisfaction of the other, the law of Scotland will not presume that he had that intention (a). It was at one time supposed that there was such a presumption; and it has been argued with much force, that the presumption against double portions, which unquestionably has been sanctioned by the law of England, is no more than the expression of a legitimate inference as to the probable intention of the settlor in the absence of other elements of proof. Thus it has been argued, if a parent, having left by his will a legacy of L.10,000 to his daughter, afterwards settles L.10,000 upon her on the occasion of her marriage, his intention would in ninety-nine cases out of a hundred be defeated if she were allowed to take the legacy as well as the provision (b).

By the law of Scotland, there is no presumption that a legacy is given in satisfaction of a provision.

Nor is authority wanting to support the theory of presumed satisfaction. Independently of the cases to which we shall afterwards refer, we have the dictum of Erskine, who says (c):—"A settlement to a daughter in a marriage-contract is presumed to be granted in satisfaction or solution of all former provisions, though it should not bear the words 'in satisfaction;' because provisions granted by fathers in marriage-contracts are generally intended to comprehend the whole estate that is to be expected by the husband from the wife or her father in the name of tocher." However, when the question was finally raised for decision before the House of Lords, in *Kippen v. Darley*, it was found that, setting aside one or two cases in which the Court appeared to have drawn the inference of satisfaction from the evidences of intention in the deed, rather than to have presumed it, there was no authority for the

Erskine's dictum examined.

(a) Per Lord Chancellor Chelmsford in *Kippen v. Darley*, 3 Macq. 238.

(b) Per Lord Cranworth in *Kippen v. Darley*, 3 Macq. 246; and see Lord Deas' opinion, 18 D. 1189.

(c) Ersk. 3, 3, 93. See Stair, 1, 8, 2; and Bankt. 1, 6, 5, where the same doctrine was thought to be implied.

proposition as Erskine laid it down. The cases on which reliance had been placed, were authorities for the converse of the proposition; that is, they established that there is a presumption for satisfaction when a father leaves a legacy to a child for whom he has undertaken to provide by a prior contract.

Satisfaction may, however, be inferred from the terms of the subsequent gift.

The observation of Erskine, however, although no longer to be received as the statement of a legal presumption, is an observation which, when used *arguendo*, may be entitled to weight, the question always being, what was the intention of the father in giving the portion (a). The terms of the settlement—the coincidence of the two provisions as regards amount, and the form of the destination, etc.—viewed in connection with the manner in which the father has dealt with his other children, may raise a presumption against duplication. “There is,” said Lord President M’Neill, in a passage which was quoted with approbation by the judges on appeal, “in certain cases, such a presumption; and that presumption is more or less strong, according to circumstances. I do not know that it is peculiarly strong when the one provision is in a will, and the other in a marriage-contract. But it is said that the presumption is, that a father brings forward everything at the marriage of his daughter, in order to secure the best terms he can from the future husband. I do not know that this rule is not too broadly stated. It only means that there is a presumption that he brings forward everything that he has in contemplation of doing for her—all that he intends to bind himself to do, but not all that he may do” (b).

Question settled by *Kippen v. Darley*.

The result of the controversy on this question is, that after an elaborate examination of all the authorities, both by the whole Court in Scotland, and by the law Lords who took part in the decision on appeal, it was settled that there is no presumption in the law of Scotland against double portions when the prior provision is voluntary and revocable (c).

State of the authorities upon implied satisfaction.

Since the decision in *Kippen v. Darley*, no case has occurred upon the satisfaction of legacies. With regard to the circumstances which would justify the Court in drawing the inference that satisfaction was intended, in addition to *Kippen’s* case itself, we have

(a) Per Lord Wensleydale, 3 M’Q. 259.

(b) 18 D. 1176.

(c) *Kippen v. Darley*, 21 May 1858, 3 M’Q. 203, affg. 18 D. 1137.

only the authority of a few decisions, pronounced before the question, on which side the presumption lay, had been resolved. Decisions arrived at, irrespective of any consideration of this fundamental question, offer but an uncertain rule for our guidance. It is necessary, however, to deal with them, as the question is one of considerable practical importance. The earliest cases upon the satisfaction of marriage-contract provisions by legacies are the two to which Lord Cranworth referred in the leading case (*a*). In the case of *Dow v. Dow*, a bond of provision granted by a father to his daughters, and made payable by his son out of the heritable estate, was held to be satisfied by a tocher which had been paid by the father at the time of the daughter's marriage. In this case the evidence of an intention to adeem was certainly not strong; and it would rather appear, as Lord Cranworth suggests, that the Court had gone upon the principle of a universal presumption against double portions.

Tendency of
the older
authorities.

Belshes v. Murray (*b*) is scarcely a case in point, as, although the second provision was given as a marriage portion to a lady to whom the donor had previously given a bequest by bond of provision, yet the donor in this case was a collateral relative; and it does not appear that he stood in *loco parentis* to the donee. The case was argued as a question upon double legacies, under which subject we have accordingly classed it (*c*). The prior legacy was held to be satisfied by the provision, apparently on the view that the alteration in the circumstances of the legatee, consequent upon marriage, had induced the settlor to bestow the second provision (which was considerably larger than the first, and was settled upon the children in fee) in substitution, and not accumulatively. To the same category—that of double legacies—we may refer the case of *Moncrieff v. Nasmyth* (*d*), where it was found that a legacy of L.100, bequeathed by a testator to a lady whom he afterwards married, was not extinguished by her marriage and acceptance of a jointure in full of all she could claim by her husband's death (*e*).

Belshes v.
Murray.

(*a*) *Dow v. Dow*, 1681, M. 11477;
Belshes v. Murray, 1752, M. 11361.

(*b*) *Belshes v. Murray*, *supra*.

(*c*) *Supra*, p. 277.

(*d*) *Moncrieff v. Nasmyth*, 1798, M. 11380.

(*e*) The Court found, however, that an annuity bequeathed to the lady under the same settlement was satisfied by the marriage-contract provisions, probably because the two provisions were *ejusdem generis*. This, at

Grant v. Anderson examined.

Of the two modern decisions founded upon in the leading case, one of them (a) may be passed over in the meantime, as it related to the satisfaction of an onerous provision by a legacy. The other case, *Grant v. Anderson* (b), decided in the same year, is more pertinent to the subject. By a settlement made in 1829, the testator bequeathed L.2000 to his daughter, "to be set aside for her at the first term of Martinmas or Whitsunday after his death, and to carry interest unto her from the said term until paid; the said sum to be vested for her behoof on good heritable or personal security, and continue so to be vested even after her marriage, if such shall ever happen, so that the principal sum shall form a provision for her and her family;" and in the following year he became a party to the ante-nuptial contract of marriage between his daughter and the pursuer, and thereby bound himself to lay out, at the first term, etc. (as before), the sum of L.2000 sterling, upon sufficient bond, heritable or moveable, for the liferent use of the spouses and the survivor of them, and to the children of the marriage in fee, with a power of changing the securities, an obligation to re-invest, and clause excluding the husband's *jus mariti*. Here it will be observed that there was a substantial identity, not only in the sums, but in the destination and the conditions of the trusts under which the two provisions were granted. Accordingly, the Court, dealing with the question as one of intention, found, that "according to the true construction of the marriage-contract, to which the late Mr Anderson was a party, the provision thereby secured to the pursuers was in satisfaction and implement, on his part, of the provision previously made by Mr Anderson to his daughter, the pursuer, in his trust settlement" (c). Lord Mackenzie, indeed, seemed to have considered that there was a presumption for the satisfaction of legacies, of a similar nature, and even stronger than that which obtains in reference to the satisfaction of provisions, though he afterwards rested his opinion upon the ground of intention. But the true principle was stated by Lord Fullerton, who said: "I cannot admit that the principle laid down by Erskine is applicable here;

Question treated by Lord Fullerton as one of intention.

least, proves that the question of satisfaction was regarded as *questio voluntatis*.

(a) *Nimmo* in R. & S. of Auchin-

blane, 29 June 1841, 3 D. 1109. See next Section.

(b) *Grant v. Anderson*, 19 Nov. 1840, 3 D. 89.

(c) 3 D. 98.

for, in all the cases in which it was applied, the prior provision had been *in obligatione*, and the judgment was put expressly on the maxim *debitor non præsimitur donare*. But this won't apply where the prior provision is by will, and has been followed by a marriage-contract. . . . I think that the last view of Lord Mackenzie is the sound one. Viewed merely as a question of intention, the preponderance is in favour of the defenders" (a).

In the case of *Rennie v. Rennie* (b), which appears to have been overlooked in the discussions in the leading case, the question was also dealt with on the principle of giving effect to the settlor's intention as distinguished from the rule of presumed satisfaction. Mr Rennie, by his trust settlement, after making provision for his wife and younger children, gave the residue to his eldest son, John Rennie, then unmarried, to whom, by a subsequent codicil, he also directed a sum of L.9000 to be paid at the first term after his decease. By a holograph letter, addressed to his son five years afterwards, he, on the narrative that his son was about to enter into the matrimonial state, obliged himself to subscribe any legal deed to the amount of L.4000 as a security for his son's wife, the interest to be paid to her as a life annuity, and the fee to be given to the children at her death, with a limited power of disposal on failure of issue. Lord Corehouse found that it was "*not presumable* that he intended thereby to enlarge the provisions which he had made for John Rennie in his *mortis causa* settlements;" and further found that the sums due by virtue of the foresaid letter must be included in payment of the special bequest of L.9000; and to this interlocutor the Court, on a review of the circumstances of the transaction, adhered.

Rennie v. Rennie.

Up to this time, it had happened in all the cases that the decision, upon whatever ground rested, was in favour of *satisfaction*. With the exception of one case, in which the sums involved were not of large amount (c), no precedent had occurred, until the case of *Kippen*, for giving effect to both provisions. The circumstances of that case are, therefore, deserving of some consideration. Mr Kippen, the father, by his trust settlement, directed his trustees to

Circumstances which are adverse to the doctrine of satisfaction.

Kippen's case further considered.

(a) 3 D. 97.

(c) *Strong v. Strong*, 29 Jan. 1851,

(b) *Rennie v. Rennie*, 10 June 1831, 13 D. 548.
9 S. 714.

convey certain landed properties to two of his sons, and to set apart L.4000 for each of his unmarried daughters; and declared, that as he had already provided for his two married daughters, the provisions made by him in their favour were in full of all they could claim or be entitled to receive from his estate. Provisions were also settled upon another son, and upon his widow. One of the three daughters to whom legacies of L.4000 had been bequeathed, afterwards became the wife of Mr Edmiston; and in her ante-nuptial contract her father undertook to pay to certain trustees L.5000 in name of tocher, payable, L.1000 at the next term of Whitsunday, and the remaining L.4000 at the grantor's decease, on trust for the liferent use of Mrs Edmiston, and for the children of the marriage in fee, with a destination over to the grantor in the event of failure of issue. By two codicils he made some material alterations upon the provisions in favour of his sons and of the two unmarried daughters.

Grounds of
the decision in
that case.

In arriving at the conclusion that Mrs Edmiston's marriage-contract provision was additional to the legacy previously bequeathed to her, one point which influenced the opinion of the majority of the judges in the Court of Session, and in the House of Lords, was the consideration of the great disparity in the relative values of the provisions which Mr Kippen had made for the other members of his family. Having determined, in the first instance, that there was no presumption against double provisions, it followed by necessary implication, that the testamentary settlement and the settlement in the daughter's marriage-contract must each receive full effect, unless they could be shown to have been identified in the mind of the settlor. But as the two provisions in favour of Mrs Edmiston were different in character and value, and were not declared to be substitutionary, and as there was no apparent intention of dealing with the children on the footing of equality with respect to their interests in the grantor's succession, the Court could only give effect to the language of the deeds, which was inconsistent with the notion of satisfaction (a).

(a) *Kippen v. Darley*; see particularly the opinions of Lord President M'Neill, 18 D. 1174, and of Lord Chalmersford, 3 M'Q. 218.

SECTION II.

SATISFACTION OF ONEROUS PROVISIONS BY LEGACIES.

Having regard to the opinions expressed by the judges who decided *Kippen v. Darley* in the House of Lords, it may now be considered a settled principle, that there is a presumption that testamentary provisions are to be taken in satisfaction of provisions secured by obligation, whether in the marriage-contract of the parent or of the child in whose favour the provision is granted. The principle is very clearly stated by the Lord Chancellor in the introductory portion of his speech, where, after observing that there was no general presumption against double provisions in favour of children, he added that there was a presumption of a more limited description, by which cases respecting children's portions were governed, and which was expressed in the formula, *debitor non præsumitur donare*. In other words, where the prior provision is obligatory, a subsequent provision will, by the law of Scotland, be deemed a satisfaction of the debt (a). To a similar effect is the observation of Lord Wensleydale, that there was no rule of the law of Scotland that a settlement on a daughter was presumed to be a satisfaction of previous provisions to children, unless those provisions were *ex obligatione*.

Presumption that legacies are to be taken in satisfaction of provisions in obligations.

Although most of the cases upon the ademption of marriage-contract provisions are of ancient date, yet, looking to their number, and to the uniform recognition of the principle that an obligatory provision is satisfied by a gratuitous provision (b), it is impossible to doubt that the doctrine in question is incorporated with the law of Scotland. Many of the older cases have been collected in the Dictionary, in the third division of the title "Presumption" (c). We shall merely refer to a few of the leading cases, including one or two that are reported in other parts of the Dictionary.

State of the authorities upon the doctrine of satisfaction.

In *Gallie v. Mackenzie* (d), a father, on the occasion of his

Satisfaction presumed

(a) *Kippen v. Darley*, 3 M'Q. 232.

(c) See M. pp. 11439-11474.

(b) 3 M'Q. 259; and see Stair, 1, 8, 2; Bankt. 1, 6.

(d) *Gallie v. Mackenzie*, 1782, M. 11374.

where the provisions are similar in amount.

entering into a second marriage, granted a bond of provision for 1000 merks, payable at his death, in favour of his son by a former marriage. By a subsequent bond of provision, bearing to be additional to the first, he granted a second provision of 1000 merks, payable on the death of his wife. By his latter will and testament he bequeathed to the same son the fee of 2000 merks, liferented by his widow, but without expressly revoking either of the bonds. The Court, by a majority, considered the testament as implying a revocation of the bonds, and sustained the defences to an action claiming payment under both. The earlier cases of *Fleming v. Fleming*, *Davidson v. Randel*, and *Young v. Pape* (a), were similar in their circumstances. In all of them the prior provision was made in the father's contract of marriage; and in all the prior provision was held to be satisfied by subsequent provisions of the same amount.

Immaterial that the subsequent provision is of larger or smaller amount.

Cases of *Stenhouse* and *Mathieson*.

The case of *Lord Yester v. Lord Lauderdale* (b), which appears to have been considered a leading case, being frequently cited in the subsequent cases under the same title, extended the principle, for there the provisions were of unequal amount; the prior provision being for L.10,000, and the subsequent provision, which was contained in the daughter's contract of marriage, for L.12,000. The Court sustained the defence of *debitor non præsuntur donare*. The more recent cases of *Stenhouse* and *Mathieson* (c), referred to by Lord Chelmsford in *Kippen's* case, and particularly the latter, establish clearly that the presumption in question does not depend upon the correspondence in the amount of the two sums. In both cases a double claim was made; first, in respect of a provision to the children of the marriage under the father's marriage-contract; and, secondly, in respect of provisions secured to the children in their own marriage-contracts. In the latter case, the father had bound himself to pay to the eldest or only daughter of the marriage the sum of 6000 merks if there should be no male issue, and

(a) *Fleming v. Fleming*, 1661, M. 8260; *Davidson v. Randel*, 1706, M. 6966; and *Young v. Pape*, 1680, M. 11476. M. 11474; *Seton v. Ramsay*, 1680, M. 11475, and other cases there referred to.

(b) *Yester v. Lauderdale*, 1688, M. 11479. See also the older cases of *Cockburn v. L. of Cambusnethan*, 1569, M. 11453. (c) *Stenhouse v. Young*, 1787, M. 11444, cited by Lord Chelmsford, 3 M'Q. 235, and by Lord Stair, 1, 8, 2; *Mathieson v. Mathieson*, 1766, M. 11453.

4000 merks if an heir-male should exist and succeed to the estate. No male issue were born of the marriage. On the marriage of the eldest daughter, her father became bound to pay her 3000 merks without any reference to the prior obligation in his own contract; and the plea *debitor non præsumitur donare* was maintained by the heir in defence to an action for payment. "The Lords found that the pursuer was a creditor for the 6000 merks, but that the after provision of 3000 merks must impute in payment thereof."

The course of the subsequent decisions has not been very consistent. *Hay v. Hay's Trustees* (a) was a carefully considered case; and there the Court found that provisions by a father in his son's contract of marriage, in the shape of an annuity or jointure to the widow, and certain money provisions to the children of the marriage (the amount of which is not stated), with a power of division, were not satisfied by a subsequent bequest of L.4000 to the children of the marriage *inter cæteros*, with a proviso, that in the event of there not being a sufficiency of funds for payment of all the legacies, including that of L.4000, the said legacies should all suffer proportional diminution. The *ratio decidendi* is thus stated by the Faculty reporter:—"The Court were of opinion that the maxim *debitor non præsumitur donare* was not applicable, the provisions and the legacy being so completely different in their nature; that this was just a question between co-legatees; that the father had shown manifest indications of what was his intention; and that the whole circumstances of the case were in favour of the interlocutor of the Lord Ordinary, to which they adhered *in toto*."

Satisfaction not presumed, unless the provisions are *ejusdem generis*.

Marriage-contract provision to Widow and Children not satisfied by legacy to Children alone.

In the subsequent case of *Dundas v. Dundas* (b), where an heir of entail executed a bond of provision in favour of his four daughters, containing an obligation to pay to each of them L.7000, and an annuity of L.35 a-year, redeemable for L.350, which was more than the entail allowed to be laid on the estate in favour of younger children, and also more than the granter was bound to settle upon them by his own marriage-contract, the Court held that the presumption against donation did not apply; but the reporter's statement of the nature of the action is so indistinct, that it is not

Dundas v. Dundas.

(a) *Hay v. Hay's Trs.*, 16 May 1823, 2 S. 318; more fully reported in the Faculty Collection.

(b) *Dundas v. Dundas*, 12 June 1827, 5 S. 790.

apparent whether the maxim was pleaded to the effect of extinguishing the first provision merely, or to the effect of reducing the subsequent provision to the amount stipulated in the contract of marriage. If the latter view were maintained in defence, there can be no doubt that the decision of the Court repelling the plea was sound; for the presumption against duplication of provisions has never been carried the length of obliging the beneficiary to accept a smaller provision in lieu of a larger.

Nimmo's case.

In *Nimmo's case* (a), the latest authority on the ademption of marriage-contract provisions by legacies, the Court returned to the rule of construction sanctioned by the decisions of the last century. This case was very much discussed in the subsequent case of *Kippen v. Darley*, which has been so often referred to; but the observations made upon it in the House of Lords do not tend to throw any doubt on its authority as a precedent. Thomas Nimmo, the father, by the marriage-contract of one of his daughters, bound himself to pay to her, whom failing, to the issue of the marriage, the sum of L.1000 in two portions, payable respectively, with interest, at the expiration of one year and five years from his death. By a subsequent deed of settlement, which was held to have revoked by implication a previous settlement, made before his daughter's marriage, Mr Nimmo burdened his estate with legacies to each of his daughters of L.1000, payable in two portions at the same terms as are above mentioned, and declared that in case any of his daughters should die without issue, then the said legacy of L.1000 to each of his daughters should lapse and belong to his son and his heirs.

Addition of a destination over, on failure of issue, not sufficient to overcome presumption in favour of satisfaction.

Remarks upon this decision.

This case, as Lord Chelmsford has observed (b), was truly one in which the rule of *debitor non præsumitur donare* was applicable; because the daughter's marriage-contract, which was made by the father, and which was in *obligatione*, preceded the provisions made by her father in his trust settlement. And the observation of the noble and learned Lord is fully borne out by the terms of the judgment, which were, that, "according to the *just construction and true meaning* of the last disposition and settlement, executed in March 1830 by Thomas Nimmo, deceased, the provision of L.1000 therein appointed for the said Elizabeth is not to be taken as a separate

(a) *Nimmo* in R. & S. of *Auchinblane*, 29 June 1841, 8 D. 1109.

(b) In *Kippen v. Darley*, 3 M.Q. 236.

and additional provision to that of the same amount already appointed to her in her marriage-contract of November 1825" (a). The opinions of the judges, however, do not throw much light upon the law of satisfaction. The Lord Justice-Clerk and Lord Moncreiff refer to the dictum of Erskine cited in the previous section; but the Court appear not to have decided the case upon any fixed presumption or rule of interpretation, but to have dealt with it rather as a question of intention.

Where a legacy or donation is given in satisfaction of a provision, but subject to a different destination, it would seem that, *quoad* the amount of the provision, the original destination must be held to be in force (b). A very distinct opinion to this effect was intimated by Lord Moncreiff, in the case last referred to (c).

The cases to which reference has hitherto been made, relate to money provisions payable either by the granter's executors, or charged upon his heritable estate. It was settled by the House of Lords, in an early case (d), that a son, by accepting a disposition of the father's landed estate, is not deprived of his right to a share of a money provision constituted by the father's contract of marriage (e).

(a) 3 D. 1111.

(b) *Murray v. Murray*, 17 May 1826, 4 S. 589; *Beattie's Trs. v. Cooper's Trs.*, 14 Feb. 1862, 24 D. 519; see 532; *Haig v. Haig*, 14 Feb. 1857, 19 D. 449.

(c) *Nimmo's case*, 3 D. 1120.

(d) *Pringle v. Pringle*, M. 11446, 5 Br. Sup. 693; Elchies, "Mutual Contract," No. 15. See *Lord Cardross v. E. of Mar*, 1639, M. 11440.

(e) It were much to be desired that some intelligible principles of interpretation could be laid down with reference to the doctrine of ademption. The judges of the last century were consistent; for they made every other consideration bend to the rule, "*debito non presumitur donare*." In more modern times, it was seen that the rigorous application of the maxim as a presumption of law would occasionally have the effect of defeating the intention; and accordingly it is now reduced to a presumption of fact,

capable of being redargued by evidence of a contrary intention. Such evidence, however, must be found within the settlement itself, and must depend upon a comparison of the two settlements, the differences in their conditions and limitations, the amount of the provisions, etc.; or on a comparison between the modes in which the settlor has dealt with the child whose provisions are in question, and his other children. It is therefore susceptible of analysis. The tendency and value of the different elements may be fixed, and the result of the different combinations estimated. Some such process at least ought to be attempted whenever a case is decided on specialties contrary to the tenor of the presumption; so that the interpretation of similar settlements in future may be removed as far as possible from the bias or caprice of individual minds. Some progress in this direction has already been made in

Question, when subsequent provision held to be in satisfaction whether limitations not contained in the original gift are binding.

Disposition of heritable estate not held to be in satisfaction of legitim.

Satisfaction
in virtue of
an express
declaration.

It can scarcely be necessary to add, that if a settlor expressly declare that the sums thereby bequeathed to his widow or family are additional to those which he has previously bound himself to pay by his marriage-contract, the latter cannot be held to be satisfied by the former. The contrary, however, was seriously maintained, both in the Court of Session and on Appeal, in a comparatively recent case; the argument being, that as the settlor's father was a joint obligant with him in the marriage-contract provision, the son should be regarded as the primary obligant, and as

England, as will be seen from the following sketch of the more important points decided; the materials having been drawn from a work, the value of which we have frequently had occasion to acknowledge, Messrs White and Tudor's Leading Cases:—

1. The general rule is, that where a legacy is given by a parent, or a person standing in *loco parentis*, as great as, or greater than, a portion or provision previously secured to the legatee, there is a presumption that it is given in satisfaction (*Hinchcliffe v. Hinchcliffe*, 3 Ves. 516; and cases cited 2 Wh. & T. 326); and though the legacy is not so great as the portion, it is still presumed to have been intended as a satisfaction *pro tanto*. A slight difference in the destination is not regarded. Thus, in *Lady Thynne v. Earl of Glengall*, 2 H. L. Ca. 131, a father having agreed to settle L.100,000 consolidated stock upon his daughter, transferred one-third part thereof to the trustees of the settlement, and gave them his bond for the remainder, prestable at his death; the stock to be held by the trustees in trust for the daughter's separate use for life, and after her death, for the children of the marriage, as the husband and she should jointly appoint. The father afterwards by will gave to his trustees, in trust for his daughter's separate use for life, remainder for her children (without restriction to that marriage), as she

should appoint, a moiety of the residue of his personal estate. The House of Lords, affirming Lord Langdale's decision, held that the moiety of the residue was in satisfaction of the obligation to transfer the balance of the sum of stock provided for the lady's marriage, notwithstanding the difference in the trusts.

2. The presumption that the gift is in satisfaction, may be repelled by intrinsic evidence, showing an intention to give a double portion (*Lethbridge v. Thurlow*, 15 Beav. 334). Again, a radical difference in the nature of the provisions will suffice to overcome the presumption. A contingent interest in a legacy is, for obvious reasons, not held to be in satisfaction of a vested interest or provision (*Belasis v. Uthwall*, 1 Atk. 426; *Hanbury v. Hanbury*, 2 Br. C. Ca. 352). It seems to have been laid down in several of the older cases (2 Wh. & T. 328), that a legacy charged on land was not to be considered as a satisfaction for money, nor a pecuniary legacy, for land; but this distinction was disregarded by Sir W. Grant (*Bengough v. Walker*, 15 Ves. 507). A declaration in the settlement constituting the provision, that an advancement by the parent in his lifetime is to be taken in satisfaction, does not exclude the presumption of satisfaction by a legacy. But a share of intestate succession is not taken to be in satisfaction of a provision; for in

intending to discharge that obligation out of the first of his testamentary dispositions. But the Courts had no hesitation in giving effect to the declared intention of the settlor (a).

SECTION III.

SATISFACTION OF DEBTS BY LEGACIES.

The class of cases which we are about to consider is distinguished from those which were the subject of the last section, by the nature of the consideration forming the counterpart of the debt, which is necessarily an important circumstance when the intention of the granter is in view. Marriage-contract provisions, it is to be observed, although onerous in the sense of being obligatory, are granted for a rational as distinguished from a lucrative consideration; and there is therefore more reason for the presumption that the granter means to include such provisions in the amount which he provides to his children in the ultimate settlement and disposal of his succession. In the case of a bequest by a debtor, the presumption is weaker. *Prima facie*, it is less likely that a testator, while professing to bestow a gift on the object of his favour, is in fact only providing for the payment of a lawful debt. Accordingly, it will be seen that in this class of cases, although the presumption expressed in the maxim *debitor non præsумitur donare* holds good as an abstract rule, yet it is to be received in no stronger sense than as throwing upon the legatee the onus of showing that there was in fact an intention to bequeath

How far the maxim *debitor non præsумitur donare* is applicable to legacies in favour of Creditors.

this case there is no room for presumed intention (*Twisden v. Twisden*, 9 Ves. 413).

3. A second provision may in some cases be presumed to be in satisfaction of the first (*Davis v. Chambers*, 3 Jur. N. S. 297), but the presumption is weaker than in the case of satisfaction under a testamentary bequest, where the testator is professedly disposing of his whole property (*Palmer v. Newell*, 20 Beav. 32, 40, per Sir J. Romilly, M.R.).

4. Legacies by strangers, not in loco

parentis, are only held to be in satisfaction of prior provisions when given for the same purpose, e.g., to buy a particular house, to purchase a commission, etc. (*ex parte Pye*, 18 Ves. 140; *Monck v. Monck*, 1 Ball. & B. 308; 2 Wh. & T. 336-7). In this class of cases, the principles of interpretation appropriate to the case of double legacies would seem to be applicable.

(a) *Cruikshank's Trs. v. Cruikshank*, 24 Apr. 1845, 4 Ball, 179, affg. 5 D. 733.

—a fact which, in most cases, may easily be established from the terms of the bequest.

Although it appears from reported cases that circumstances are generally sufficient to overcome the presumption against donation, that presumption must be recognised.

The weakness of the presumption against donation in this class of cases, is sufficiently apparent from the circumstance that in almost all the cases that have been presented for decision in our Courts, it has been held that the intention of the testator was to give the legacy in addition to the debt—a circumstance which, in the case of *Balfour v. Balfour's Trustees* (a), was strongly urged in support of the proposition, that the use of words of *bequest* was in itself sufficient to overcome the presumption against donation. That view of the law, however, was inconsistent with former precedents, and was expressly overruled. "From the nature of the thing," said Lord Moncreiff, "the maxim must comprehend cases in which that which is done would in itself import and have effect as a donation, if the obligant or granter were not at the time debtor to the grantee. The maxim would have no meaning, if it did not apply to such cases. The thing which is not to be presumed to be donation where there is a previous debt, must necessarily be such, in its form and nature, that it would import donation if there were no debt. . . . Taking this view of the principle, I can by no means come to the opinion that it can never take effect where a grant, or the appointment of a payment to be made, is conceived in the form of a legacy or *mortis causa* settlement" (b).

Doctrine of the English and Scotch law on this subject contrasted.

So far as regards the rule of presumption, therefore, our law upon the satisfaction of debts is in harmony with that of England; but with regard to the manner and degree in which that presumption is binding upon the conscience of the judge, or capable of disturbing the verdict to which the evidences of the testator's intention would naturally lead, a difference of opinion—more marked, perhaps, in theory than in practice—is apparent. It has

(a) *Balfour v. Balfour's Trs.*, *infra*. See on the subject generally the cases in *Morrison*, *voce* Presumption, Div. III. Sections 5 and 7. The cases are mostly of very ancient date; and as the grounds of the judicial verdict are rarely stated, we have thought it unnecessary to refer to the cases in detail.

(b) 4 D. 1052. In the same case it was observed by the Lord Justice-

Clerk Hope, that having had an opportunity of seeing the very full notes of the Lord Justice-General of the opinions of the judges in the case of *Arnot v. Spaden*, 14 Jan. 1819, and in *Hardie v. Kay's Trs.*, 17 Jan. 1821, he found that all the judges recognised the relevancy of a defence against payment of a legacy founded upon the legal presumption in question.

been said that the decisions of the Court of Chancery discover a leaning or inclination to break through the rule, while the tendency of the decisions of our own Courts is rather to place it in subordination to the evidences of the testator's meaning. The tendency of the English decisions is, we have no doubt, fairly represented by the editor of the *Leading Cases in Equity* in the following passage:—"The rule as to the presumption of the satisfaction of a debt by a legacy, is founded upon reasoning alike artificial and unsatisfactory, and it has consequently met with the censure of the most eminent judges, who, although they would not break the rule, have at the same time said they would not go one jot further, and have always endeavoured to lay hold of trifling circumstances in order to take cases out of it" (a).

In Scotland, however, the presumption has never been regarded as artificial in its origin or unsatisfactory in its results. On the contrary, it has been characterized as an equitable presumption founded on the natural probability of the debtor's intention; but liable to exceptions in its application, wherever there is either direct evidence of a purpose of donation, or circumstances leading to a contrary inference from that in which the rule consists (b). In admitting evidence of a contrary intention, the Courts of Scotland do not seek to confine the application of the presumption. But allowing due weight to it, they hold that it may be displaced by more positive evidence. They do not attach importance to circumstances which cannot bear on the question of intention with the view of escaping from the fair results of a principle, the consequences of which it may be thought desirable to restrict; because the presumption is merely a presumption of fact, and does not preclude inquiry into the meaning of the testator. At the same time, it must be confessed that the tendency of such a principle of interpretation is to reduce the law upon the whole matter to a state of great uncertainty. The judgments in most of the cases are verdicts; and little can be gathered from the reported opinions but a record of the impressions made upon individual minds by the general tenor

Principle upon which, in Scotland, the presumption may be overcome by evidence of a contrary intention.

Uncertainty of the law, in consequence, in the application of the principle.

(a) 2 Wh. & T. L. Ca. 338; *Lady Thynne v. The Earl of Glengall*, 2 H. L. Ca. 153; *Richardson v. Greese*, 3 Atk. 65. (b) See Lord Moncreiff's opinion, 4 D. 1052.

of the deeds which were the subject of construction. In this state of the law, all that can be attempted is to point out the circumstances which have been considered to militate against the presumption expressed in the brocard, and which, when combined with other circumstances of a similar tendency, will effectually overcome it.

General direction to pay debts immaterial to the question of satisfaction.

In the first place, it would seem that no weight whatever is to be attached to a circumstance which in England has been held fatal to the presumption, viz., that the trust deed contains a direction to pay debts, and that such direction precedes the order to pay legacies; for, as has been justly observed, every settlement implies such a direction; and the obligation of the trustees to pay debts, and to account for the funds to creditors, receives no additional strength from the testator's injunction (a).

The presumption for satisfaction not overcome by differences as to the term of payment.

It was observed, in the case we have been considering, that differences as to the term of payment are of no great importance to the question (b). And this seems just; because a testator may mean that a legacy should be taken in satisfaction of the debt, although the time of payment is postponed, if the loss of interest consequent upon postponement is compensated by a considerable addition to the principal sum (c).

(a) Per Lord J.-C. Hope in *Balfour v. Balfour's Trs.*, 4 D. 1054. In England it was settled by the case of *Chancey*, a leading authority on this subject, that the Court was bound to infer, from an expressed direction for payment of debts and legacies, that it was the intention of the testator that both the debt and the legacy should be paid to the creditor (1 P. Wms. 408; and see *Richardson v. Greese*, 3 Atk. 65; *Field v. Mostin*, Dick. 543; *Hailes v. Darell*, 3 Beav. 324, 332). In *Jefferies v. Michell*, 20 Beav. 15, the testator gave, after payment of his debts, certain legacies, and amongst others a legacy of L.150 to his granddaughter, to whom he was indebted to the same amount. Here, said Sir John Romilly, M.R., there was an express direction to pay both the debts and the legacies: the testator may have supposed that his granddaughter could not take both the debt and the legacy;

but if so, he had failed to express his intention. Both sums were held to be due. It seems that a direction to pay debts without mentioning legacies is not sufficient to rebut the presumption against donation (*Edmunds v. Low*, 3 K. & J. 318, 321; *Rowe v. Rowe*, 2 De G. & Sm. 297, 298).

(b) 4 D. 1055.

(c) The cases in which differences in regard to the time of payment were held of essential importance are somewhat antiquated; and we are not satisfied that such circumstances would receive the same consideration from the Court of Chancery now, if an opportunity were afforded of reconsidering the point. See, however, *Spaden v. Spaden's Trs.*, 1 S. Ap. Ca. 164, cited *infra*, p. 313, as to how far the presumption may be repelled in the case of postponement for an indefinite period.

The fact that there is an ulterior destination of the legacy to a different person, or to a different class of heirs from those who would be entitled to claim payment of the debt, is an element of great importance, and will in general be sufficient to overcome the presumption; for, in the case supposed, if the original legatee predecease the settlor, there is then no longer any *concursus debiti et crediti*. The possibility of the right to the two claims coming to be vested in different persons, must be held to have been within the contemplation of the settlor. This, in fact, was the only ground in the leading case of *Balfour v. Balfour's Trustees* (a) for taking the legacy out of the rule. The testatrix was indebted to her brother in the sum of L.3000, which he had advanced, in conformity with the wishes of his father, to enable her to purchase a house; and having afterwards acquired a large fortune, she bequeathed, first, L.16,000, and afterwards, by a codicil, L.20,000 to this brother. The money advanced for the purchase of the house was considered to be a heritable debt, while the legacy of L.20,000 was of course chargeable against the executry estate, and the destination was to "heirs, executors, and assignees." The destinations being to a different order of heirs, the Court held that the debt was payable in addition to the legacies.

Legacy with a destination over not presumed to be in satisfaction of a debt.

Balfour v. Balfour's Trustees.

If the legacy is given upon a condition, it is to be presumed that the testator did not intend it to be in satisfaction of the debt; for he could not suppose that he was entitled to adject conditions to an obligation, the fulfilment of which might be unconditionally enforced. This was the principle of the decision in *Hunter v. Nicolson* (b), where a legacy of L.1000, given by a father to his daughter on condition that he should succeed in recovering his share of the succession of his deceased brother, was held not to be given in satisfaction of a claim for L.1000, arising upon a verbal promise to pay that sum made on the occasion of her marriage. Postponement to an indefinite time is virtually a condition, and has been held sufficient to rebut the presumption for satisfaction.

Conditional legacies not presumed to be in satisfaction of debt.

In *Spaden's Trs. v. Spaden* (c), the settlor left a legacy of

Spaden's Trustees v. Spaden.

(a) *Balfour v. Balfour's Trs.*, 10 Mar. 1842, 4 D. 1044; see *Ritchie v. Ritchie*, 6 June 1858, 20 D. 1093.

(b) *Hunter v. Nicolson*, 29 Nov. 1836, 15 S. 159.

(c) *Spaden's Trs. v. Spaden*, 5 July 1822, 1 S. Ap. Ca. 164, affg. on this point only, 14 Jan. 1819, F. C.

L.300 to his foreman, to be paid to him at the first term after the decease of his mother. The legatee claimed in addition to the legacy a sum of L.500, alleged to be partly for money advanced, and partly as remuneration for services rendered. The Court, and Lord Eldon on appeal, were of opinion that the maxim *debitor non præsuntur donare* did not apply in this case, chiefly on the ground that the deceased owed the petitioner a debt at his death, as had been now ascertained by the Court; that a person could not intend to pay a debt by a legacy, payment of which was postponed to an indefinite distant period; and that the deceased specially directed that all his debts should be paid before this legacy (a).

Legacy not held to be in satisfaction of debt unless it is *ejusdem generis*.

Lastly, where the legacy and the debt are not *ejusdem generis*, e.g., if the one is an annuity and the other a fixed sum, the inference as to the testator's intention is the same as in the case of double legacies. As the one sum cannot be directly and immediately applied in satisfaction of the other, it is presumed that there was no intention to adeem, and both are payable (b).

Claims against husband's estate for wife's share of goods in communion.

The principle admits of being further illustrated by the cases where claims against a husband's estate for the wife's share of executry have been met by the plea of satisfaction in consequence of the husband having left a legacy or provision to the claimant. As in this class of cases the debt is due by the husband in a special character, namely, as *executor* or *intromitter* with his wife's succession, it may be doubted whether there is any proper concurrence between the two claims, so as to admit of the application of the maxim. The leading case is *Hardie v. Kay's Trs.* (c), where the claim was not held to be satisfied by the legacy. The subsequent case of *Cullen v. Wemyss* (d) went upon the plea of *mora*; and in *Sinclair v. Rorison's Executor*, the legacy to the testator's daughter was expressly declared to be inclusive of her mother's share, and presumption was thus excluded (e). In an early case, however, the presumption was admitted to the extent of holding a claim by a daughter against her father, as executor of her grandfather's will, satisfied by a provision which he had granted to her *inter vivos* (f).

(a) 1 S. Ap. Ca. 167.

(d) *Cullen v. Wemyss*, 16 Nov.

(b) *M'Dowall v. Gordon*, 10 July 1838, 1 D. 32.

1833, 11 S. 952.

(e) *Sinclair v. Rorison*, 11 Dec.

(c) *Hardie v. Kay's Trs.*, 17 Jan. 1821, F. C.

1852, 15 D. 212.

(f) *Fife v. Nicolson*, 1751, M. 2309.

SECTION IV.

SATISFACTION OF LEGACIES AND PROVISIONS BY ADVANCES (a).

The cases to which we refer are those in which a settlor, after granting a provision in favour of a child or other legatee, payable at his death, makes advances to the same party in the shape of pecuniary payments during his lifetime. It might be thought, that in this class of cases the presumption *debitor non præsuntur donare* would not apply; for even in the case of an onerous provision, e.g., an obligation undertaken by a marriage-contract, the father is not a debtor to the child during his own lifetime, the obligation being, in the case supposed, only prestatable at his own death.

Whether the rule *debitor non præsuntur donare* is applicable to the satisfaction of legacies by advances.

This peculiarity, affecting the satisfaction of provisions by advances, was pointed out by Lord Murray in his interlocutor in *Scott v. Scott* (b), reporting the case to the Second Division of the Court. In that case, a father, by his post-nuptial contract of marriage, bound his estate in payment of a sum of L.3000 to each of his daughters, payable at the first term after his death, with interest from that term until payment; declaring that the provisions should be in full satisfaction of legitim and executry; and by a subsequent trust deed his general estate was made liable to relieve his heirs of entail of the amount of the provisions in question. One of the settlor's daughters having become a widow during her father's lifetime, and being left without the means of supporting herself and family, an annual allowance was given to her by her father, and she also had the use, rent free, of a house and farm. The sums which were advanced to her amounted in all to about L.1300, as appeared from entries in the father's day-book, some of which were also transferred into his ledger in an account opened in her name.

Scott v. Scott.
Advances by a Father or person in loco parentis.

(a) A debt due to a deceased person by the party who succeeds as his legal representative is extinguished by confusion, although action has been raised upon it in the lifetime of the defunct. Creditors therefore cannot claim it as assets of the defunct's estate (*Elder v. Watson*, 2 July 1859, 21 D. 1122).

791, 796. Compare this case with *White v. White*, 28 Jan. 1841, 3 D. 468, where property purchased for the granter's sons, in order to give them an electoral qualification, was held to be a donation, and not imputable towards the sons' shares in the succession.

(b) *Scott v. Scott*, 2 June 1846, 8 D.

On the part of the lady's brother, who succeeded to the entailed estates, it was maintained that the provision in her favour had been satisfied to a considerable extent by the advances in question; as, after giving credit to her for an annuity varying from L.45 to L.30, which it appeared, from certain memoranda left by the father, that he had intended to settle upon her as an additional provision, there remained advances in excess of the annuity to the extent of nearly L.500. The judges of the Second Division were divided as to the applicability of the presumption against donation (a). In substance, however, the Court seem to have acquiesced in the opinion indicated by the Lord Ordinary; because, in the consideration which they gave to the facts of the case, no weight whatever appears to have been attached to the presumption. The ratio of the decision appears to have been that there was no evidence of an intention to impute the advances in satisfaction of the provision. The entry of the advances in the father's books was held in this, as in the older cases (b), not to be decisive of the intention to keep up the advances as a debt, because such entries would be made by a person in the habit of keeping an account of his personal expenditure, for the purpose of showing what had been done with the money.

Advance only imputable in satisfaction of legacy when there is evidence of intention to deal with it.

Lord Eldon's judgment in *Miller v. Miller*.

It was observed by the Lord Justice-Clerk (c), in commenting upon the case of *Miller v. Miller*, that the application of the maxim *debitor non præsumitur donare* had been recognised in the latter case by the House of Lords. Lord Eldon, however, did not directly refer to the maxim, nor does it appear to us that the question of its application was raised before him (d). The question was as to the power of a father to make additional provisions to his younger children, after having bound himself in his eldest son's contract of

(a) See the opinions of Lord J.-C. Hope and Lord Cockburn (8 D. 799, 806), who thought that the maxim applied generally, but was excluded by the circumstances of the case. Lord Medwyn, on the contrary, thought that the presumption was excluded, on the ground that Mr Scott was neither by legal or voluntary obligation a debtor to his daughter; and added that such payments could not be set off against a debt due after death, unless

under very peculiar circumstances of explanation and agreement on both sides.

(b) *Campbell v. M'Alister*, 18 Jan. 1827, 5 S. 219; *M'Dougall's Crs. v. M'Dougall*, 31 Jan. 1804, M. Bankrupt, No. 21; *Drummond v. Swayne*, 28 Jan. 1834, 12 S. 342.

(c) 8 D. 799.

(d) See the case *Miller v. Miller*, 30 July 1822, 1 S. Ap. Ca. 308.

marriage to convey the whole estate to him, under burden of the provisions made by him for his younger children. The judgment of the House was to the effect that the provisions therein referred to were provisions already made, and that subsequent provisions *intuitu mortis* were either to be considered as a violation of the contract, or as being in satisfaction of the provisions made for the same children by deeds executed before the date of the marriage-contract. But as to advances or payments of money *inter vivos*, it was expressly found that such payments, not being of the nature of permanent provisions, "ought *not* to be considered as in extinction or satisfaction of the provisions so made for the children previous to the said marriage-contract, and intended to take effect on Mr Miller's death" (a).

On the whole, it may be concluded that there is no positive presumption that advances made by a father to a child are designed as anticipatory payments of the provisions in their favour contained in his settlements, but that slight evidence of such an intention on the part of the father may be sufficient to raise a presumption; the question always being, whether the father intended a donation or a loan. The cases of *Robertson v. Robertson's Trustees* and *Webster v. Rettie* (b), where the point was raised in a question with other children claiming legitim, may be consulted with reference to the kind of evidence sufficient to establish an intention to impute advances to a son in satisfaction of his interest in the succession.

Conclusion.
No presumption for satisfaction by advances to children.

In the case of advances by a party not standing *in loco parentis*, the general presumption against donation comes into operation. In this class of cases, accordingly, advances are regarded as loans, in the absence of proof to the contrary, and as such, may be recovered by the granter's executors or imputed in satisfaction of the donee's interest in the succession (c).

Advances by a party not standing *in loco parentis*.

If a settlor declare in the deed of provision that payments in his lifetime shall be taken in satisfaction of the provision, all questions as to the presumptions arising upon the circumstances of payment are obviated by the express terms of the declaration. *Hutchison v.*

Express declaration that advances are to be received as in satisfaction of legacy.

(a) 1 S. Ap. Ca. 316.

(b) *Robertson v. Robertson's Trs.*, 15 Feb. 1838, 16 S. 554; *Webster v. Rettie*, 4 June 1859, 21 D. 915.

(c) *Buchanan v. Mollison*, 16 June

1824, 2 S. Ap. Ca. 445; *Murray v. Murray*, 5 Dec. 1843, 6 D. 176; and see *Fyfe v. Kedslie*, 6 Mar. 1847, 9 D. 853.

Skelton (a) is an authority on the construction of this very common form of provision. The testator, by his trust settlement, provided to each of his daughters the sum of L.1500, to be secured, with interest, at his death, to the daughters for their liferent use, exclusive of the husbands' *jus mariti*, and to their children respectively in fee, subject to the provision, "that whatever sum or sums have already been paid, or may in my lifetime hereafter be paid, to any or either of my said children, whether sons or daughters, and vouched by receipt or other written document, or entered to their debit in my ledger or other account-book, shall be held and accounted, without reckoning interest thereon, as so much of the provision falling to such child or children under this deed of settlement." To one of his daughters the settlor had advanced L.1000 in his lifetime; and the First Division of the Court of Session were of opinion that this sum could not be taken as in satisfaction of the testamentary provision, as it was no satisfaction to the children of that daughter that their mother had received payment of the provision in advance. But the House of Lords reversed the decision, holding that where the intention to satisfy a provision to a family by advances to the parent was expressly declared, the circumstance that the children received no benefit from the advance was immaterial. As to the reasonableness of the declaration which the testator had made, his intention evidently was to deal equally with all the members of his family—an intention which would be defeated were one of the daughters allowed to take the benefit of the advance without imputing it in satisfaction of the disposition in her favour (b).

In such cases, provision to a daughter and her children may be satisfied by advances to the daughter herself.

(a) *Hutchison v. Skelton*, 18 July 1856, 2 Macq. 492.

(b) See 2 Macq. 497, per Lord Ch. Cranworth.

CHAPTER XLII.

OF ELECTION UNDER THE DOCTRINE OF APPROBATE AND REPROBATE.

It is a rule of general jurisprudence, that no person can accept a gratuitous provision which is given as an equivalent for a debt or legal provision, and at the same time claim the provision for which the equivalent is given. The principle of this rule has been denominated by Scotch jurists the law of Approbate and Reprobate, from the maxim *quod approbo non reprobo*. The principle that the legatee has the option of either accepting the legacy, or rejecting it, and claiming his legal rights, is known in modern practice as the doctrine of election—a term which had previously been applied to it by English jurists.

Doctrine of Approbate and Reprobate defined.

The intention to substitute a gratuitous provision for a debt or legal provision, may be declared either in express words or by implication. In the former case, if the debt is described in language sufficient to identify it, or if the legal claim is described by its appropriate name, or by words which in the language of municipal law comprehend it, no question can arise either under the law of Scotland, or of any other system of law with which we are acquainted, as to the applicability of the doctrine of election (a). If, on the other hand, the intention to give a conventional provision as an equivalent for a legal provision is implied—that is, if it results from the force of legal presumption—the law of the testator's domicile, under which the legal provision would enure to him, must decide whether the terms of the settlement, the relationship of the parties, and the circumstances under which the conventional provision has been

Intention to put donee to his election may be either declared or implied.

International questions.

(a) See *Dundas v. Dundas*, 22 Dec. 1880, 4 W. & S. 460, affg. 7 S. 241; *Bennet v. Bennet's Trs.*, 1 July 1829, 7 S. 817; *Kerr v. Roxburgh*, 1 Bligh, 1; *Cunningham v. Cunningham*, 1 Bligh, 27, M. 617; *Prentise v. Malcolm*, 1749, M. 6591; and in the law of England, *Brodie v. Barry*, per Sir W. Grant, 2 Ves. & B. 127; *Welby v. Welby*, 2 Ves. & B. 187.

granted, are such as to raise the presumption that the conventional provision was given as an equivalent (a).

Questions relate to (1) the elector; (2) subject of election; (3) disposal of rejected provision.

The points which we intend to illustrate relate to—*first*, the persons by whom election may be made; *secondly*, the property which may be the subject of election; and, *thirdly*, the consideration of the question, what becomes of the rejected provision,—that is, of the share of succession which might have been claimed *ex lege*, supposing the legatee to adopt the settlement, or, on the other hand, of the legacy, if he reject the settlement.

Election must be spontaneous. Capacity of party.

1. The election must be the spontaneous and deliberate act of the *party* who is in right of the bequest (b). An election made in ignorance of the party's legal rights (c), or in circumstances not admitting of deliberation (d), may be recalled. Homologation of the settlement will not easily be implied from facts and circumstances in the case of an express repudiation, executed within a reasonable time after the settlement came into operation (e). An election made by a minor is null, or at all events reducible, on the ground of minority and lesion (f). The *curator bonis* of a lunatic is not bound to elect on behalf of his ward, whether to take his legal or testamentary provisions (g); but if an arrangement is made between all the beneficiaries under a settlement with a view to the distribution of the estate, it may be the duty of a *curator bonis* to enter into it, if terms are offered favourable to the interests of his ward; and if he does so, the transaction will be binding, though it will not be allowed to affect the character of the lunatic's succession as heritable or moveable (h). A father has no power to deprive his

Minors.

Curators of insane persons.

(a) See I. 162–166, *supra*, where an explanation is given of the principles upon which the English and Scotch Courts resort to the law of the domicile, in order to ascertain whether a beneficiary is put to his election with reference to the acceptance of testamentary provisions.

(b) *Brodie v. Brodie*, 6 July 1827, 5 S. 900; *Telford v. Jamieson*, 12 May 1835, 13 S. 735; *Rose v. Rose*, 20 Nov. 1821, 1 S. 154.

(c) *Johnstone v. Paterson*, 29 Nov. 1825, 4 S. 234; *Hope v. Dickson*, 17 Dec. 1833, 12 S. 222.

(d) *Selkirk v. Law*, 2 Mar. 1854, 16 D. 715; and see *Lowson v. Young*, 15 July 1854, 16 D. 1098.

(e) *Panmure v. Crockat*, 22 Nov. 1854, 17 D. 85; *Hutchison v. Hutchison*, 7 Feb. 1822, 1 S. 295; *Hog v. Lashley*, 7 May 1792, 3 Pat. 247.

(f) Cases in note (b), *supra*.

(g) *Cowan v. Turnbull's Trs.*, 17 Mar. 1848, 6 Bell, 222, affg. 7 D. 872.

(h) *Kennedy v. Kennedy*, 15 Nov. 1843, 6 D. 40; see *Pet. Hope*, 15 Jan. 1858, 20 D. 391.

insane child of legitim, or to limit the interest of the child by a general settlement to a fixed provision (a).

A husband is not entitled to elect for his wife, though, if he concur with her in claiming legitim, he is held to have repudiated the testator's disposition, and is barred from claiming a legacy bequeathed to himself (b). In the cases of *Stevenson v. Hamilton* and *Lowson v. Young* (c), the question was discussed, whether the creditors of a husband were entitled to control the wife's right of election between her legal and conventional provisions. In the former case, the wife had ratified the settlement by which the *jus mariti* was excluded, which was in other respects highly favourable to her own interests and those of her children. The husband, who had not consented to her approbation of the settlement, joined with his creditors in claiming legitim in her name; but the Court, in conformity with the opinion of a majority of the whole judges, sustained the election, and preferred the lady for her provisions.

Wife may elect to take conventional provisions settled on herself in lieu of legal provisions.

In *Lowson's* case the circumstances were similar, except that the wife had, in the first instance, intimated to her husband's trustees her intention to claim legitim; but afterwards, with her husband's concurrence, resolved upon adopting the settlement, which conferred upon her a larger benefit than she could have obtained by claiming legitim. The Court decided in favour of the wife, on the ground that she had made a fair choice, and that there was no nimious interference with the interests of creditors; subject to the observation, that a wife would not be allowed capriciously, where the disproportion was great, to renounce a larger interest which would have gone to creditors, for a smaller interest secured to herself (d).

Whether husband's Creditors can object to a capricious exercise of the right of election.

A parent is not entitled to elect on behalf of his children; and where a settlement provides a liferent interest to the testator's son and the fee to his grandchildren, the repudiation of the liferent provision by the son does not affect the grandchildren's right to the fee. This was the point decided in the leading case of *Fisher v. Dixon* (e), where the House of Lords found, that although the

Children not prejudiced by parents' election.

Fisher v. Dixon.

(a) *Morton v. Young*, 11 Feb. 1813, F.C.

(b) *D. of Buckingham v. Marq. of Breadalbane*, 15 Dec. 1843, 6 D. 250.

(c) *Lowson v. Young*, 15 July 1854, 16 D. 1098; *Stevenson v. Hamilton*, 7 Dec. 1838, 1 D. 181.

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(d) See observations of Lord Pr. M'Neill and L. Rutherford, 16 D. 1103.

(e) *Fisher v. Dixon*, 1 July 1833, 6 W. & S. 431, affg. 10 S. 55; *Collier v. Collier*, 6 July 1833, 11 S. 912; *Ewen v. Watt*, 10 July 1828, 6 S. 1125.

testator's son had received payment of legitim, the grandchildren were entitled to payment in full of the capital of the sum which was left to them, subject to their father's liferent. In a subsequent case (*a*), where a father settled the interest of a sum of money upon his daughter, and left the principal to her family in the event of her marrying, whom failing, to her sisters and brothers, adding, "it is understood that I include her mother's share in the above sum;" and the daughter repudiated the settlement and claimed legitim, as well as her portion of her mother's interest in the goods in communion,—it was held that the daughter's children could only claim the capital, subject to deduction of the sum that would have fallen to their mother as one of her mother's next of kin.

Deed ineffectual to convey heritage, does not put the Heir to his election.

2. As to the *subject* of election, it will include, as a general rule, all property of which the testator has declared his intention of disposing, whether actually within his power or not; and may include, for example, the interest in an entailed estate (*b*). But if the deed is in form inhabile to convey land, it will not be presumed that the testator intended to subject his landed estate to the dispositions of the deed, although heritable property is mentioned in it. This principle would apply to a testamentary conveyance of heritable and moveable estate executed by a party domiciled in Scotland (*c*).

But the Courts may compel an Heir of foreign real estate to make it available for the purposes of the will.

Where a testator dies, domiciled in England, his will conveying Scotch heritage, if framed in language adapted to convey real estate according to the law of England, is held to put the heir to his election, either to relinquish his right as heir of the Scotch estate, or to repudiate the settlement (*d*). So also, where a Scotch testator executes a settlement in Scotland ineffectual to convey English or foreign property, but indicating an intention to convey it, the heir to the property is precluded by the law of Approbate and Repro-

(*a*) *Sinclair's Exrs. v. Rorison*, 11 Dec. 1852, 15 D. 212.

(*b*) *Carmichael v. Carmichael*, 15 Nov. 1810, F. C.; *Smith v. Murray*, 9 Dec. 1814, F. C.

(*c*) See *Campbell v. Munro*, 23 Dec. 1836, 15 S. 310.

(*d*) *Murray v. Baillie*, 24 Feb. 1849, 11 D. 710; *Campbell v. Munro*, 23 Dec.

1836, 15 S. 310; *Lamb v. Montgomerie*, 20 July 1858, 20 D. 1323. The question whether he is put to his election, is in this case determined by the law of England, the law of the will. See also *Robertson v. Robertson*, 16 Feb. 1816, F. C.; *Trotter v. Trotter*, 10 June 1829, 3 W. & S. 407; *Campbell's Trs. v. Campbell*, 11 July 1862.

bate from claiming the English real property as heir-at-law, and also the testamentary provisions in his favour (a).

Where the expression of the testator's will is contained in several distinct writings, the whole must be read as one settlement; and the heir cannot repudiate one of them, or reduce it on the head of death-bed, without forfeiting the provisions in his favour contained in the other (b). *A fortiori*, an heir cannot claim a legacy given to him out of moveable estate by a deed which he challenges as ineffectual to convey heritage because it was executed on death-bed (c); though he may found upon the deed which he challenges to the extent of taking advantage of a clause of revocation contained in it, if he has an interest (d). Of course, if the settlement does not dispose, or affect to dispose, of the whole succession, the beneficiaries are entitled, in their character as heirs-at-law, to claim what is undisposed-of; for there is no inconsistency in claiming what the testator does not, as well as what he does, dispose of (e). And where two settlements were distinct in their scope, so that the Court could not infer that they were intended to stand or fall together,—the one being a testament, and the other a deed of entail,—it was held that the acceptance of a bequest under the testament did not bar the heir from challenging the deed of entail as being *ultra vires* (f).

Election where different subjects are conveyed by different writings, forming part of one entire settlement.

A beneficiary who accepts a testamentary provision, being barred from making any claim inconsistent with the expressed will of the testator, is necessarily precluded from taking an interest in the legal succession in the capacity of representative of a deceased heir. On this principle it was held, with reference to a settlement in favour of the granter's children, with a destination over to survivors, the vesting being postponed until the majority of

Beneficiary adopting the settlement cannot claim legal succession as representative of a Co-beneficiary.

(a) *Dundas v. Dundas*, 22 Dec. 1830, 4 W. & S. 460; *Alexander v. Bennet's Trs.*, 1 July 1829, 7 S. 817.

(b) *Black v. Watson*, 9 Feb. 1841, 3 D. 522; *Stewart, etc., v. Stephen, etc.*, 29 Nov. 1832, 11 S. 139.

(c) *Kerr v. D. of Roxburgh's Trs.*, 23 Nov. 1815, Hume, 25, affd. 1 Bligh, 1.

(d) *Battleby v. Small*, 2 Feb. 1815, F.C.; *Kerr v. D. of Roxburgh's Trs.*,

supra. As to the exclusion of the heir's interest, see I. 63, *supra*.

(e) *Wightman v. De Lisle*, 16 June 1802, F.C. See *Robertson v. Ogilvie's Trs.*, 20 Dec. 1844, 7 D. 236; *Maitland v. Maitland*, 14 Dec. 1843, 6 D. 244; *Wilson v. Dick*, 30 June 1840, 2 D. 1236.

(f) *Urquhart v. Urquhart*, 20 Feb. 1851, 13 D. 742.

the children, that the surviving children who had adopted the settlement were not entitled to claim legitim as representatives of those who had died in minority, after surviving the testator, and who had therefore acquired a vested interest in the legitim fund (a).

To what extent a Testator may affect his Legatee's private estate.

By virtue of the law of Approbate and Reprobate, a testator may not only exclude his legatees from any claim to his own estate, in their character as debtors or legal representatives, but he may also burden the legatee with the payment of provisions to other parties, or dispose indirectly of what belongs to another,—as an example of which, we may instance the *legatum rei alienae* of the civilians, which has been recognised in the law of Scotland; and he may, of course, attach what conditions he pleases to his bequest, provided they are lawful and possible (b). However, the doctrine must be received with this qualification, that if the fulfilment of the condition would involve the sacrifice of the legatee's right to a different subject without entailing any benefit on the objects of the testator's bounty, the condition will not be enforced, on the principle, that as the testator must have intended the benefit of his legatee, he would not have imposed the condition if he had foreseen the consequences. On this principle, where an heir of entail had made up his title to an entailed estate as fee-simple proprietor, and had afterwards executed a new entail, comprehending the entailed estate as well as other fee-simple property, it was held that the heir, by acceptance of the additional grant, was not bound to hold the entailed property subject to the conditions of the second entail; because in so doing he would have incurred an irritancy, which could not have been within the contemplation of his ancestor (c).

Appropriation (1) of rejected legal succession; (2) of rejected conventional provisions.

3. The question as to the disposal of funds set free in consequence of a beneficiary exercising his right of election, involves the application of several distinct principles. We shall consider, in the first place, the position of the fund considered as subject to legal claims, in the event of the beneficiary adopting the settlement; and thereafter the position of the fund viewed as the sub-

(a) *Stewart's Trs. v. Stewart*, 20 Dec. 1851, 14 D. 298.

(b) On the subject of burdens upon heirs of provision, see p. 228; on legacies of subjects not belonging to the testator, p. 219; and on conditions on legacies, p. 234.

(c) *Arbuthnott v. Arbuthnott*, 1792, Bell's Oct. Ca. 161, M. 620; *Urquhart v. Urquhart*, *supra*; *Douglas' Trs. v. Douglas*, 20 June 1862; stated, *infra*, 328.

ject of disposition, in the event of the beneficiary rejecting the settlement.

(1). With regard to the legal claims of the heirs-at-law and executors of the testator, no difficulty can arise. As to heirs-at-law, it seems clear, though the point has never been decided, that if an heir portioner accepts a testamentary or dispositive provision in lieu of the inheritance, the share of heritage liberated by the election of such heir to take under the settlement will fall into the general residue, to be applied for the purposes of the settlement. This is evident, indeed, from the consideration that the co-heirs would have no title to reduce the settlement—for example, on the head of death-bed,—except to the extent of their respective shares. As to shares of executry, it is sufficient to say that the defunct is entitled to dispose of his part of the succession as he pleases, and the legatees have no option. However, a legatee may be entitled to claim a provision or debt out of the dead's part, and as to that, may be put to his election, whether to relinquish the debt or the legacy (a).

Rejected shares of heritable and moveable succession fall into residue.

With respect to terce and courtesy, it is sufficient to say that the acceptance of a fixed provision in lieu of either of those life-rent rights, operates in the same manner as a discharge of the life-rent, so that the entire estate becomes subject to the purposes of the disposition (b). But suppose that the special provision is made payable out of a moveable fund, and that the heir-at-law should challenge the settlement as having been executed on death-bed, would the terce accresce to the fee-simple estate, or would the settlor's trustees be entitled to retain it as in compensation to the fund out of which the special provision was payable? The analogy of the case of *Sawer* (c) upon *jus relictæ* is favourable to the first view; but after the criticisms that were passed upon that case by the law Lords in the second case of *Fisher v. Dixon* (d), reliance cannot be placed upon it as an authority.

Quære, whether the benefit of unclaimed terce enures to the Heir-at-law successfully challenging settlement *ex capite lecti*.

As to the disposal of lapsed shares of legitim, it is necessary to distinguish between a discharge of legitim during the father's life—

Unclaimed legitim.

(a) See Chapter XLI. Section 3, as to the ademption of debts by legacies.

(b) This has been declared by statute with respect to terce (1681, c. 10). See Chapter XL. Section 3, p. 291.

(c) *Andrews v. Sawer*, 2 Mar. 1836, 14 S. 589, *infra*, p. 327.

(d) *Fisher v. Dixon*; see opinions in 2 Bell, pp. 78–80.

time, whether by ante-nuptial contract or by acceptance of a provision *inter vivos*, and the case of acceptance of a legacy in satisfaction of legitim.

Distinction between legitim discharged and legitim satisfied by acceptance of a testamentary provision.

Rule as to legitim discharged.

The effect of a discharge is the same as if the child had predeceased his father; the right lapses, and the benefit of it enures to the other children interested in the legitim fund (a). "Up to the time of the father's death," said Lord Cottenham in *Fisher v. Dixon* (the second case reported under that name), "the right of the children to legitim, though spoken of as existing for some purposes, is at most future and subsequent, depending not only upon the amount, if any, of the property, but upon the number of children entitled to partake of it at the father's death. But upon that event happening, all contingency ceases, and the right becomes present and vested; so that if the child die before it receives its share, the representatives are entitled to it" (b).

Legitim which might have been, but has not been claimed, falls into residue.

In the same case, it was decided by all the law Lords on appeal, in conformity with the opinion of a majority of the judges of the Court of Session, that the acceptance by a child, *after* the father's death, of a provision declared to be in satisfaction of the legitim, operated in favour of the general donee, and not of the children who betook themselves to legitim (c). In this case, the question lay between the holders of the legitim fund and a general donee, who was burdened with provisions in satisfaction of legitim. The principle of the decision would obviously apply to a similar question between claimants of legitim and the residuary legatee under a trust settlement. It is an obvious deduction from the principles established by *Hog v. Lashley* and *Fisher v. Dixon*, that a discharge of legitim by *all* the children operates in favour of the residuary legatee or next of kin alone, if made after the father's death; but if before, then in favour of the widow jointly with these parties, the division of the succession being in that case bipartite.

Disposal of unclaimed *jus relictæ*.

It was decided by the concurring judgments of Lord Corehouse

(a) *Hog v. Lashley*, 7 May 1792, 3 Paton, 247, affg. M. 8193; *Lord Panmure v. Crokatt*, 29 Feb. 1856, 18 D. 703; *Martin v. Agnew*, 1749, M. 8167; *McGill v. Oxenford*, 1671, M. 8179; *Fisher v. Dixon*, *infra*.

(b) *Fisher v. Dixon* (2d case), 2 Bell, 73.

(c) *Fisher v. Dixon*, 6 April 1843, 2 Bell, 63, affg. 2 D. 1121, 3 D. 1181; confirming *Henderson v. Henderson*, 1782, M. 8191.

and the Court, that the effect of the acceptance by a widow, after her husband's death, of a special provision in lieu of *jus relictæ*, was to subject the estate to a bipartite division, so that in effect the benefit of the lapsed interest accrued jointly to the legitim fund and to the dead's part (a). The question there was not materially different in principle from that which was involved in *Fisher v. Dixon's* case (b). The observations of the law Lords in the latter case, made on the assumption that *Andrews v. Sawyer* was inconsistent with the principle of *Henderson v. Henderson*, upon which they proceeded, have virtually overruled *Andrews v. Sawyer*; and trustees may now safely assume that a discharge of *jus relictæ* after the death of the head of the family has no effect upon the legitim, but operates in favour of the fund charged with the special provision.

Authority of
Andrews v.
Sawyer denied
in *Fisher v.*
Dixon.

As we have already pointed out, though a father of a family, after providing for his wife and children, declares that their portions shall be accepted by them in full satisfaction of legitim, *jus relictæ* and other claims, if he die intestate, as to a part or the whole (c) of his heritable or moveable succession, the children are nevertheless entitled, as his next of kin, to claim that part of his moveable estate of which he has not disposed; the eldest son being, on the same principle, entitled to claim all undisposed-of heritage (d).

Children
may claim
undisposed-of
succession
notwithstanding
an exclusion
of their
rights by marriage-settlement, etc.

(2). The result of the authorities is, therefore, that the benefit of a lapsed *legal* provision enures to the fund burdened with the conventional provision, usually the residue, or if that be undisposed of, then to the settlor's heirs. It will be seen that the result is precisely similar in the event of a *bequest* being forfeited in consequence of the legatee claiming his legal provisions. In this case also the residuary legatee is entitled to the resulting benefit, on the principles that have been explained in treating of residuary interests (e).

Unclaimed
conventional
provisions fall
into residue.

The leading case is that of the *Marquis of Breadalbane's Trs. v. Lady E. Pringle* (f), a decision of great authority, from the

Breadalbane
Trs. v. Pringle.

(a) *Andrews v. Sawyer*, 2 Mar. 1836, 14 S. 589.

(b) 2 Bell, 75, 78; *Campbell's Trs. v. Campbell*, 11 July 1862.

(c) *Wilson v. Gibson*, 30 June 1840, 2 D. 1236; *Maitland v. Maitland*, 14 Dec. 1843, 6 D. 244.

(d) *Blackwood v. Dykes*, 26 Feb.

1833, 11 S. 443; *Sinclair v. Traill*, 27 Feb. 1840, 2 D. 694; *Stoddart v. Thomson*, 1734, Elch. Succession, No. 1.

(e) Chapter X. Section 1 (Resulting Trusts); and Chapter XXXVIII. (Residuary Interests).

(f) *Breadalbane Trs. v. Pringle*, 15 Jan. 1841, 3 D. 357; *M'Innes v.*

eminence of the judges who concurred in it. The testator directed that his trustees should "annually pay over the free rents of his unentailed lands to my two daughters, Lady Elizabeth Campbell (afterwards Pringle), and Mary, Marchioness of Chandos, *equally* between them, while both should be in life, and to the *survivor*, and should continue to do the same as long as both or either of them should be alive." The second daughter, afterwards Duchess of Buckingham, claimed her legitim, contrary to the purpose and scope of the settlement; and the decision of the Court was, "that the interest of Lady Elizabeth Pringle in the rents of the unentailed estates is not enlarged by the forfeiture which the Duchess of Buckingham has incurred, but that such forfeiture operates during the lifetime of the Duchess of Buckingham, in favour of the trustees of the late Marquis of Breadalbane" (a). The principle was, that the testator intended to give the legitim fund to the heirs of the residuary interest, as a surrogatum for the burdens imposed upon that interest, who are therefore entitled to be relieved of these burdens *pro tanto* out of the legitim fund. It was strenuously maintained, however, that as there was a destination over to the survivor of the two sisters, the bequest must be held to be joint, both in words and substance, and that the accepting sister was therefore entitled *jure accrescendi* to the benefit of the lapsed share (b). But it will be seen that the Court refused to anticipate the vesting of the subsequent interest, or to hold that a right made contingent upon the death of the co-legatee came into operation in consequence of her election to take her legal provisions, instead of the bequest (c).

Annandale v.
M'Niven.

The subsequent decision in *Annandale v. M'Niven* (d) is not inconsistent with that in the *Breadalbane* case. The testator gave his widow a liferent of the whole estate in lieu of terce and *jus relictæ*; and appointed his trustees at her death, in case of failure of issue (which happened), to divide the residuary estate amongst certain collateral relatives. The widow claimed her legal provisions.

M'Allister, 29 June 1827, 5 S. 801, 807; *Peat v. Peat*, 14 Feb. 1839, 1 D. 508.

(a) Decree, 3 D. 366.

(b) 3 D. 361.

(c) Decree *ut supra*, and opinions, pp. 361-6.

(d) *Annandale v. M'Niven*, 9 June 1847, 9 D. 1201.

The Court awarded the surplus liferent interest to the residuary legatees, and decreed for an immediate division (a).

It may happen that the residuary legatees are not the same persons to whom the fee of a wife's liferent provision is specifically destined. But this need not occasion any difficulty in the determination of the question, who is entitled to the forfeited bequest; the principle being in every case, that the party whose interest is diminished by the amount of the legal claim is entitled to that which the settlor had intended to bestow as an equivalent for it (b). This principle is exemplified by a case where the heir incurred a forfeiture of a bequest of a share of residue, in consequence of his having succeeded in reducing the settlement as a disposition of heritage on the head of deathbed. In this case it was found that the forfeited share accresced to the interest of the co-residuary legatees, on the ground that their interest was diminished by the transference of the heritable estate to the heir (c).

Principle of
Compensation.

In conclusion, we may refer to a recent decision in which effect was given to the principle, that if a party erroneously supposing himself to have a power of appointment over the property of another disposes of it by will, his legatees who repudiate the appointment are not thereby put to their election, with regard to the testamentary provisions in their favour. The distinction was taken in this case, that the testator did not know that he was disposing of that which was not within his power; for if he had known, the case would have come within the rule of *res aliena scienter legata* (d).

(a) On the question whether the discharge of a temporary burden entitles the legatees to an immediate division, see Chapter XLV., *infra*. In the present case there could be no doubt, because the only element of contingency in the destination had been removed by the death of the testator's children. The mere subsistence of the widow's liferent, supposing she had

accepted, would not have prevented the fee from vesting.

(b) See *Dixon v. Fisher*, 1 July 1833, 6 W. & S. 431, affg. 10 S. 55; *Peat v. Peat*, *supra*.

(c) *Nisbet's Trs. v. Nisbet*, 5 Dec. 1851, 14 D. 145.

(d) *Douglas v. Douglas*, 20 June 1862.

CHAPTER XLIII.

OF THE DOCTRINE OF VESTING UNDER SIMPLE TESTAMENTARY DISPOSITIONS.

SECTION I.

PRELIMINARY.

Definition of vesting.

AN INTEREST is said to *vest* in a beneficiary as soon as he possesses a *jus crediti* or *indefeasible right* to it,—such right being, according to the law of personal property, transmissible to heirs and assignees. Conversely, an interest does not vest while the beneficiary's right remains contingent, and defeasible; and accordingly, if the beneficiary die before the occurrence of the event on which the succession is contingent, his interest lapses, and is not transmitted to his representatives.

A succession cannot vest until the Testator's death.

It follows from the definition of vesting that a *succession* (a) cannot vest until the death of the settlor. Prior to that event the trust is liable to be defeated by the exercise of the settlor's power of revocation, and the interest of the beneficiary is therefore contingent on the non-exercise of that power. As a beneficiary has no vested interest during the joint lives of himself and the settlor, the provisions in his favour must necessarily lapse in the event of his predeceasing the latter. The case of a trust to "A. B. and his heirs" is no exception to the rule. The legacy to A. B. unquestionably lapses by his predecease, and the succession devolves upon the heirs of A. B., not because they are his heirs, but because they are the persons to whom, as conditional institutes, the inheritance is destined by the terms of the settlement.

(a) But a marriage-contract provision may vest immediately.

Again, a bequest in the nature of a simple trust vests *a morte testatoris* if the beneficiary survives the testator, for he has then a personal right, *jus crediti*, to the succession; and therefore, although payment should be refused or postponed, his right does not lapse, but passes to his representatives.

Simple testamentary interests vest at the Settlor's death.

A strictly testamentary trust (that is, a trust for distribution as at the death of the testator) is accordingly free from many of those difficulties in regard to vesting which we shall have occasion to consider. But there are few trust settlements in which the distribution of the estate is not, at least to a partial extent, made dependent upon circumstances which do not necessarily emerge upon the death of the testator. It is, then, in the case of the *distribution* not being appointed to take place *a morte testatoris* that the question arises, When does the succession vest?—a question depending on the consideration, whether the beneficiary's interest is contingent or merely postponed. Contingency necessarily excludes vesting; postponement of the period of payment is not incompatible with the immediate acquisition of a vested right.

Questions as to the period of vesting only arise when the distribution is postponed.

Every question on the law of vesting may be considered as a problem involving three indeterminate elements, the specific ascertainment of which is the object of investigation. These elements are—(1) the time of payment; (2) the person to whom payment is to be made; and (3) the extent and quality of the interest taken by such person. It is of course understood that there may be as many distinct periods of payment, as many beneficiaries, and as many distinct interests conferred upon any of these, as may be dictated by the ingenuity of the settlor; and in this way the problem may be rendered the more difficult of solution. Now, if in the case of any given bequest the provisions of the settlement are positive, and exclusive of uncertainty with respect to the person, the interest, and the period of payment, a vested right is thereby of necessity conferred upon the beneficiary as soon as the settlement comes into operation,—that is, from the death of the testator in the case of testamentary settlements; from the date of marriage in the case of ante-nuptial contracts; and from the date of delivery in the case of other settlements *inter vivos*. We say of necessity, because the existence of a contingent interest in some other person is the only intelligible ground upon which the doctrine of the suspension of

Elements of the problem:
(1) Time;
(2) Person;
(3) Interest.

vesting can be rested; and where the three elements of time, person, and interest are definitely ascertained, the possibility of an adverse contingent interest is entirely excluded.

The succession vests as soon as the elements of time, person, and interest are specifically ascertained.

When the three elements in question, although not definitely ascertained by the terms of the settlement itself, are afterwards determined by the occurrence of an *event*, either before the death of the testator, or at some subsequent period, it follows by an easy deduction from the foregoing proposition, that the interest must vest from the date of the ascertainment of those particulars. Hence we derive a general rule by which almost all questions of vesting may be determined, namely,—

Vesting takes place in all cases from the time when the extent and quality of the interest, the period of payment, and the person to whom payment is to be made, have been specifically ascertained.

Contingent interests do not vest.

Contingency in regard to any of the elements we have named is incompatible with vesting. For example, a provision which is contingent on majority or marriage does not vest until the event, by reason of the uncertainty whether the *time* of payment will ever arise; while a provision payable on the expiry of a life interest vests *a morte testatoris*, because the period of payment, though not definitely ascertained, is certain. Again, a provision which is contingent upon the beneficiaries' survival of the period of payment does not vest until the event; because of the uncertainty as to the *person* to whom payment is eventually to be made.

Where one of the elements is dependent upon one of the other two.

Sometimes one of the three elements is immediately dependent upon another; the ascertainment of which will accordingly determine the period of vesting. For example, if trustees are directed to draw one year's rent of heritable property in the event of the testator leaving one younger child, and two or three years' rent in case there are more than one, and to divide the accumulated proceeds amongst the children at a fixed period; then the number of the beneficiaries being ascertained at the death of the testator, the extent of each child's interest will also be ascertained, and the interest will therefore vest.

Where the vesting depends upon an event, involving the elements above mentioned.

In the greater number of cases of postponed vesting uncertainty attaches to more than one of the elements of time, person, and interest; each of those elements being dependent upon others, and forming with them a complex condition, technically called "an

event." When such is the case, the question, who is entitled to succeed, is not susceptible of solution until after the occurrence of the event; and the Court, of course, refuse to undertake the impossible task of determining the rights of parties in anticipation of the circumstances upon which those eventual rights are contingent (a). The events upon which a succession is most usually dependent are, the majority or marriage of the legatee, the birth of children, and the condition that the legatee must survive the distribution, which is implied in a destination over. There are two circumstances which raise a presumption of immediate vesting, notwithstanding the existence of a destination over. These are—(1) a gift of interest to the institute, payable after the testator's death; and (2) the grant of a power of disposal or assignment to the institute first named in the destination; which may either be given in express terms, or indirectly by giving the legacy to the institute, his heirs and assignees (b). The effect of clauses of this nature will be fully considered in discussing the questions upon postponement of payment during life interests.

With the view of avoiding the inconvenience and expense which have so frequently to be encountered in consequence of the uncertainty which attends the determination of the period of vesting under trust settlements, it has now become matter of usual style to insert a clause in such deeds, declaring the period at which the succession shall be held to vest; and provided this is done intelligently, and with the object of removing doubts as to the settlor's intention, the introduction of such a clause is unobjectionable.

But the specification of an *arbitrary* period of vesting, without reference to the purposes of destination, is to be deprecated, as involving a contradiction between expressed and implied intention, which is more likely to create embarrassment in the construction of the deed than to remove difficulties. From the case of *Croom's Trs. v. Adams* (c), the conveyancer sees how necessary it is to adapt the conventional term of vesting to the circumstances of the destination.

The Settlor may declare at what period his succession shall be held to vest;

provided such declaration is not inconsistent with the terms of the trust destination.

Effect of repugnancy between such declaration and the trust purposes.

(a) *Harvey v. Harvey's Trs.*, 28 June 1860, 22 D. 1310; *Baillie v. Seton*, 16 Dec. 1853, 16 D. 216; *Ferrie v. Ferrie*, 23 Feb. 1849, 11 D. 704.

(b) *Johns v. Munro's Trs.*, 29 Nov. 1833, 12 S. 146; *Clark's Executors v. Paterson*, 5 Dec. 1851, 14 D. 141.

(c) *Croom's Trs. v. Adams*, 30 Nov. 1859, 22 D. 45.

Croom's Trs. v. Adams.

In that case, the vesting of the succession was appointed to take place as at the death of the testator, although the payment of certain shares of the residue was postponed until the arrival of the beneficiaries at majority, subject to the usual provision in favour of survivors. One of the beneficiaries died in minority, leaving a settlement by which she assigned her interest in the trust estate; but the Court held that the contingent interests of the surviving co-beneficiaries could not be defeated by an assignation anterior to the period of payment. "I have often thought," said Lord J.-C. Inglis, "and may have remarked, that it would be desirable, in order to avoid the difficulties which arise in the construction of settlements as to the period of vesting, that testators should expressly declare when the vesting is to take place. Here, however, the testator has done so expressly, and thence has arisen the whole difficulty in the case; so I fear that is a very doubtful remedy" (a). Where the term of vesting is *postponed* by virtue of express words to that effect, there will be less difficulty than in the case of its being anticipated; but the reports of decided cases offer sufficient evidence of the fact, that the conventional determination of the period of vesting does not always relieve trustees from the necessity of resorting to judicial advice for their guidance in the distribution of the estate (b).

SECTION II.

OF THE IMPLIED CONDITION OF SURVIVANCE.

Principle as explained by Erskine.

"When," says Erskine, "a legatee dies before the testator, the legacy is not transmitted to the legatee's executors; both because legacies are granted for the testator's special regard to the legatee himself, and because they do not become due, *dies non cedit*, until the death of the testator; and nothing can pass from one to his heir or executor, till it be due to himself. L. 5. § 1, *quand. dies leg.* On this ground, a conditional legacy falls, if the legatee die before the con-

(a) 22 D. 49.

(b) See *Brown v. Campbell*, 16 Mar. 1855, 17 D. 759; *Earl of Lauderdale*

v. Royle's Executor, 19 May 1830, 8 S. 771; *Thorburn v. Thorburn*, 16 Feb. 1836, 14 S. 485.

dition be fulfilled. L. 25, *pr. eod. tit.*" (a). It is unnecessary to seek for illustrations of the familiar principle, that testamentary provisions are personal to the grantee, or to enter at length upon the reasons upon which it is founded.

The recent case of *Cooper's Trustees v. Mackenzie* (b) affords an example of the application of the doctrine under somewhat exceptional circumstances. The settlor having at one time been insolvent, left a testamentary settlement in which he directed his trustees to reimburse his creditors (in terms of a list to be left by himself) for the losses they had sustained in consequence of his insolvency. The Court having found in a previous action that the intention of the settlor, as expressed in this settlement, ought to be carried into effect, the creditors, by a minute of agreement, divided the property amongst them in proportion to their debts, and *inter alia* allocated a dividend to the children of two parties (Rickard and Mackenzie) who had predeceased the testator, as representing their deceased parents. An action having been raised by a creditor of Rickard and Mackenzie against their children, as representing them to the extent of the dividend in question, the Court found that the sums destined by the settlor to his creditors were to be viewed as legacies; that the shares of Rickard and Mackenzie had lapsed by predecease; and consequently, that the sums paid to their children in virtue of the minute of agreement were not received by them in the character of their parents' representatives, but solely in virtue of the special agreement.

Principle illustrated by case of legacy to Creditors.

In addition to the grounds mentioned by Erskine, we may be permitted to assign another reason, which has the advantage of exhibiting the distinction between the vesting of legacies and that of obligatory provisions in a clear light. A legacy cannot vest during the life of the testator, because his settlement is ambulatory and revocable; a provision by deed may vest as soon as the grantee acquires an indefeasible interest by actual or constructive delivery.

Distinction between testamentary and obligatory provisions.

Thus the grantees under an ante-nuptial marriage-contract acquire a vested right to their provisions from the date of the mar-

Vesting of marriage-contract provisions.

(a) Ersk. 3, 9, 9, distinguishing between legacies and conditional obligations. See Bell's Prin. § 1878; *Carstairs v. Carstairs*, 1672, M. 2992.

(b) *Cooper's Trs. v. Mackenzie*, 13 Jan. 1860, 22 D. 380.

riage, or in the case of children from the date of birth; and although their interests are usually described as of the nature of a *spes successionis* in questions with creditors (a), yet, as they constitute a preferable and indefeasible claim against the surplus estate after payment of debts, it may be said, correctly enough, that such provisions vest from the birth of the children. It may be doubted, however, whether they pass by legal assignation during the lifetime of the obligant. It is clear, that wherever a *jus crediti* is conferred by a marriage-contract, as, for example, by an obligation prestable after, or bearing interest (b) from a date which may arrive during the father's lifetime, the right so conferred will vest from the birth of the child, and will not be suspended until the occurrence of the period of payment (c). As it has been settled that children on whom a *jus crediti* has been conferred by marriage-contract may rank on the father's sequestrated estate for their shares, it follows that their rights are assignable either by will or deed *inter vivos* during his lifetime, as was indeed expressly found in the case of a marriage-contract provision to a wife, in *Burden v. Smith* (d).

Vesting of
irrevocable
provisions
inter vivos.

It is equally clear that provisions obligatory by deed *inter vivos* are assignable, although the period of payment may be postponed to the death of the grantor. This was expressly decided in the case of *Greig v. Moodie* (e), where a father, in implement of a previous agreement, had disposed his heritable property absolutely to his eldest son, who was infert, under burden of a certain provision in favour of his sister. The lady predeceased her father, having conveyed her interest to her husband, by deed of settlement. The Court gave effect to her settlement, being of opinion that the provision constituted in her favour as a real burden had not lapsed by her predecease.

Construction
of words
pointing to a
period of vest-
ing antecedent
to the Testa-
tor's death.

In the case of testamentary or *mortis causa* settlements, the presumption that the vesting is suspended until the testator's death, is too strong to be overcome by any words implying a power of disposal in the grantee at an earlier period. In the case of *Horsbrugh v. Horsbrugh*, the following, among a variety of other questions, was

(a) *Goddard v. Stewart*, 9 Mar. 1844,
6 D. 1018.

(b) See *Grindlay v. Merchant Maiden
Hospital*, 1 July 1814, F. C.

(c) *Jolly v. Graham*, 24 Feb. 1824,

2 S. 730; *Cruickshank's Trs. v. Cruick-
shank*, 2 Nov. 1853, 16 D. 7. And see
Chapter XLIV., Sections 3 and 4.

(d) 27 April 1738, 1 Paton, 214.

(e) 30 Nov. 1839, 2 D. 169.

referred to the opinions of the whole Court:—The granter of a settlement, after narrating the terms of her brother's will (which proved ineffectual), and the legacies bequeathed by him, directed her trustees to pay these legacies "in such manner as the same would, in case I had died in the lifetime of my said brother, at his decease have been satisfied by and out of his estate." One of the legatees survived the brother, but predeceased the settlor; and the question was raised, whether the period of vesting under the brother's will was to be held as imported into the settlement. The Court held that the legacy had lapsed in consequence of the legatee predeceasing the settlor, who, although adopting her brother's testamentary disposition, was in law as well as in fact the testator (a).

A destination to the legatee's assignees is, by a rule of construction depending on the same principle, restricted to assignees after the period of vesting. For the recognition of prior assignments would involve the contradictory assumption that the legacy was at the date of the assignment a vested right in the person of the cedent. In the case of *Graham v. Hope*, there was a destination of a sum of L.2000 to a husband and wife in joint fee and liferent, for the liferent use only of the wife in case of her survivance, and to the husband, his heirs and assignees, in fee. The husband predeceased the settlor, and left all his property to his brother, who claimed the fee of the above sum of L.2000 as conditional institute under the destination to heirs and assignees. But the claim was rejected by the Court, on the ground that the assignment could only take effect when the legacy became vested in his person. It could not give him the power of assigning while the right was not vested in himself (b). Nor can a power of disposal conferred upon a liferenter be exercised by deed, until the liferent has vested in the donee (c); though an appointment by will, executed prior to the period of vesting, will be sustained if the appointer survive, on the principle that a will speaks from the last moment of life (d).

Destination to "Heirs and Assignees" does not confer an assignable interest until Testator's death.

In the case of *Bell v. Cheape* (e), a residuary bequest was given to a party in liferent and her children in fee, and in the event of

(a) 1 Mar. 1848, 10 D. 824.

(b) 17 Feb. 1807, M. Appx. Legacy, No. 3; and see *Burden v. Smith*, 1738; Cr. & St. 214.

(c) *Henry v. Grant*, 19 Feb. 1824, 2 S. 725.

(d) *Hyslop v. Maxwell's Trs.*, 11 Feb. 1884, 12 S. 413.

(e) 21 May 1845, 7 D. 614.

her death *without issue*—thus suspending the vesting till the expiration of the life tenant; and the trustees were directed to pay and make over the fee to another party, “her heirs, executors, or assignees.” The question was, whether an assignation could be sustained, which had been executed by the conditional institute after the death of the settlor, but before the expiry of the life tenant? A majority of the whole judges were of opinion that the assignation was ineffectual to exclude the heirs of the cedent, holding, on the authority of the previous cases, that the introduction of the word assignees in the destination was merely a matter of style, and could not have the effect of rendering a contingent right assignable. The case seems to have been decided entirely upon authority; for, as Lord Fullerton observed, if the question had been open, the most natural and obvious reading of a bequest in such terms would be, that though it does not vest a right of succession in the heir prior to the period of payment, it imports the conditional institution of his representatives, whether by testate or intestate succession; the word “executors” applying to the first case, and that of “assignees” to the latter (a).

Whether provisions in mutual settlements vest on the death of one of the parties.

On the construction of legacies bequeathed by mutual settlement, it was formerly held that the legatee took an absolute vested interest in the whole subject upon the death of either of the joint donors (b), on the principle that a mutual settlement is onerous, and therefore only revocable by mutual consent. This doctrine was fully recognised in the case of *Lawson v. Stewarts* (c). In that case, however, there was a special declaration in the mutual settlement, that in the event of any of the primary legatees predeceasing the survivor of the parties to the settlement, the legacies should fall and belong to their executors or next of kin. The Master of the Rolls advised the House of Lords that those words were intended to express a qualification of the interest previously conferred on the legatees, and that they imported a conditional institution of *legal* executors and nearest of kin in the event of non-survival of both the

(a) 7 D. 634. See *Clark v. Paterson*, 5 Dec. 1851, 14 D. 141.

(b) *Nicolson v. Ramsay*, 16 Dec. 1806, M. “Legacy,” No. 2; *Dykes v. Boyd*, 3 June 1813, F. C. But see

Wilson’s Trs. v. Stirling, 13 Dec. 1861, 24 D. 163.

(c) 20 June 1827, 2 W. & S. 625, affirming 4 S. 384, decided by the House of Lords on the advice of the Master of the Rolls.

settlers; the effect of which was to prevent assignment prior to the death of the surviving settlor (a). This case, therefore, affords another illustration of the rule, that legacies are not assignable prior to the conventional term of vesting. The recent cases of *Belfrage* and *Wilson's Trs.* (b), where the survivors of the parties to mutual settlements were held entitled to revoke, turned entirely on the terms of the power of revocation.

Miller v. Milne's Trustees is a case somewhat special in its circumstances. A married lady had delivered to a friend a letter, which bore that "upon presenting this letter after the death of Mr Milne and myself, you shall be entitled to a couple of hunder pond at the first term after our death, and if I shall survive Mr Milne, upon presenting this you shall be entitled to demand four hunder in place of two." The grantee survived Mr Milne, but predeceased his lady. Here it was clear, from the terms of the letter—if the analogy of the law of legacies was applicable—that there was no *jus exigendi*, and therefore no vested interest, until after the death of both the spouses. But the Court were much divided in opinion on the question whether the letter constituted a legacy, or ought not rather (being a delivered document) to be regarded as a postponed obligation. Ultimately, by a large majority of the whole judges, it was decided that the provision was personal to the legatee, and lapsed by his predecease (c).

Vesting of a
donation
mortis causa.

In connection with the doctrine of survivance, the question has been mooted, whether, in the event of the death of a legatee occurring simultaneously with that of the testator—as in the case of both being in a vessel which is lost at sea—the legacy would be held to have vested. Survivance being a condition precedent to vesting, it seems more consonant with principle to hold that the onus of proving the survivance lies upon the heirs of the legatee (d).

Vesting where
Testator and
Legatee perish
by the same
calamity.

The question, whether the legatee shall be held to have survived the testator, may also arise in that exceptional class of cases where the fact of death has been ascertained, although the time of the death of one of the parties remains uncertain. The point arose in *Fairholme's* case, where the settlor had made a disposition of his

Where it is
uncertain
whether the
Legatee sur-
vived the
Granter, must
a Conditional
Institute prove
non-surviv-
ance?

(a) 2 W. & S. 636.

(c) 3 Feb. 1859, 21 D. 377.

(b) *Wilson's Trs. v. Stirling*, *supra*;
Belfrage v. Davidson, 20 June 1862.

(d) This is the rule in England.
Williams' Executry, 1084.

whole estate to one of his nephews, who had accompanied Sir John Franklin's party on the ill-fated expedition to the Arctic Seas in 1845. The settlement contained a clause of conditional institution in favour of the legatee's younger brother. The truster having died on 23d May 1853, an action of declarator and payment was brought by the conditional institute, claiming the succession on the ground that his brother must have predeceased the settlor. A proof was taken, in which the whole circumstances connected with the history of the voyage and the subsequent exploring expeditions were detailed. The Court held it to be established by the evidence, that the whole party had perished prior to the winter of 1850, and accordingly gave decree in favour of the conditional institute (*a*). Nothing was said by the judges in this case upon the important question, on which side lay the onus of proof.

SECTION III.

OF THE IMPLIED INSTITUTION OF THE TESTATOR'S CHILDREN.

Definition and
supposed
origin of the
principle.

If the maker of a general settlement, being at the time without children, dies without having revoked it, and children are born to him either posthumously or within a moderate interval before his death, there is a very strong presumption that the disinheritance was unintentional (*b*). For this reason, equity imports into the settlement the implicit condition, *Si testator sine liberis decesserit*, which, according to Erskine, is borrowed from the civil law (*c*).

(*a*) *Fairholme v. Fairholme's Trs.*, 18 Mar. 1858, 20 D. 813.

(*b*) Ersk. 3, 8, 46; Bell's Prin. § 1776.

(*c*) Mr Erskine, in this passage, appears to have confounded the doctrine of implied institution of a legatee's children with that now under consideration; and the passages which he cites from the text of the civil law are applicable to the former doctrine. The fact is, that the equitable privileges accorded by the civil law to children for whom no testamentary provision

had been made, were greatly more extensive than those which the Courts of Great Britain have received as part of their municipal law. By the civil law, every child, whether born or unborn at the date of the settlement, must have been either expressly instituted heir, or expressly disinherited. Accordingly, if a Roman citizen made a will, passing over any of his children without words of *express* disinherison, the will was broken—*ruptum* (Inst. Lib. 2, Tit. 13, 1; Lib. 2, Tit. 17, 1). As one application of this principle, the force of a

But the benefit of the implied condition is confined to children who are liable to be ousted by the settlement, and does not enure to their representatives (a). The leading case is *Colquhoun v. Campbell* (b). The settlor, who had been twice married, and had no prospect of a family, bequeathed one-half of his personal property to his widow, and the other half to his own relations in the proportion of certain specified sums, and also left the lease of the farm to his widow. Three years after the execution of the settlement, a daughter was born to him; and he survived the period of her birth only three months, during which time he was suffering from ill health. The Court reduced the settlement *in toto*. The judges differed as to the extent to which the presumption might be carried; Lord Glenlee holding that the condition would apply, unless it was "as plain as a pike-staff that the testator did not intend the succession to go to the child;" while the other judges seemed to rely rather on the circumstance that the period of the testator's survivance was very short, coupled with the fact that the deed was a total settlement, and that the reduction was at the instance of the child herself, suing by her factor *loco tutoris*.

Colquhoun v. Campbell.

In *Colquhoun's* case, all the legacies were virtually residuary. The question whether the condition *si sine liberis* attaches to simple legacies, was expressly reserved; but it would be difficult to find a principle on which the vitality of a settlement should be maintained, for the benefit of legatees of quantity exclusively, after the destination to the more favoured parties has been cut down. There is more reason, perhaps, for excluding the application of the implied condition in the case of special legacies, or destinations limited by the titles or securities of particular subjects (c).

Whether legacies are revoked by the operation of the implied condition.

The condition fails where there is a manifest or presumable intention to disinherit. "If," says Erskine, "the testator had afterwards children, and, notwithstanding their existence for some com-

Condition fails, where there is evidence of intention to exclude children.

settlement was held to have been destroyed by the birth of children after the date of the settlement—*liberi postumi*—unless such children had been expressly disinherited by such words as, "Whatever children may hereafter be born to me, I disinherit them." Even in that case, it would seem that

the settlement was liable to be set aside as improvident, under the *Querela inofficiosi testamenti*.

(a) *Watt v. Jervie*, 1760, M. 6401.

(b) 5 June 1829, 7 S. 709.

(c) See *Mags. of Montrose v. Robertson*, 1738, M. 6398; *Kilk.* 455; *Yule v. Yule*, *infra*.

petent time before his death, made no alteration of the settlement in their favour, it is presumed that he neglected them from design, especially if the settlement was not of the whole or the greatest part of his estate" (a). On this principle, a provision to a brother was sustained, where the granter had survived the birth of his child two years without recalling the destination (b).

Bearing of the cases on implied institution of Legatee's children.

The cases referred to in a previous chapter, concerning the condition *Si institutus sine liberis decesserit* (c), have an important bearing on the present subject. But inasmuch as the condition *si institutus* confers on the children of a legatee merely a right of conditional institution, there is less room for the presumption of intentional disinherison, in the event of their being passed over (d).

Whether a settlement is impliedly revoked by the birth of a posthumous child.

It has yet to be determined, with reference to the case of a total settlement in favour of all the existing children nominatim, whether, in the event of a posthumous child being afterwards born (or, what is the same in legal effect, in the event of the father dying suddenly, after the birth of the child), the condition *si sine liberis* would have force to carry an equal share of the succession to the youngest child (e). In *Oliphant v. Oliphant*, reported by Mr Bell (f), the Court sustained the claim of a posthumous child to a share of a bond of provision destined to the settlor's two elder daughters nominatim, on the avowed principle that this was not a question of the interpretation, "but of the extension of a will" (g). In point of principle, there is no difference between the extension of a special bequest and that of a residuary interest: it is a mere matter of amount. The posthumous child would, in any view, be entitled to a share of legitim.

(a) Ersk. 3, 8, 46.

(b) *Yule v. Yule*, 1758, M. 6400.

(c) Chapter XXXVII. Section 3. The case of *Grant's Trs. v. Grant*, decided since that chapter was printed, raised the interesting question, whether the condition *Si institutus sine liberis decesserit* applied to a destination of mixed (heritable and moveable) estate to the settlor's son. The First Division (Lord Curriehill dissenting) decided in the affirmative, and held that the heritable estate went to the eldest son in virtue of the condition.

(d) See remarks, *supra*, p. 259, on the extension of the doctrine to the case of grandchildren.

(e) In the language of the Roman law, all children born after the execution of the settlement were "postumi." See on this subject generally, Inst. Lib. 2, Tit. 2, 1; Lib. 2, Tit. 17, 1; Dig. 28, 3, 3; and 28, 2, 10.

(f) *Oliphant v. Oliphant*, 1794, Bell, Fol. Ca. 125; 5 Br. Sup. 648. See *Anderson v. Anderson*, 1729, M. 6590; 1 Paton, 136.

(g) Bell, Fol. Ca. 126.

CHAPTER XLIV.

OF THE VESTING OF POSTPONED INTERESTS.

IN the introductory section of the last chapter, we observed that contingency—which prevents the acquisition of a vested interest—arises where the distribution is postponed either to an uncertain event, or to an event which, though certain as to time, is rendered uncertain as to the person who is to succeed, in consequence of the creation of interests contingent upon the death of the institute before the period of distribution.

Suspension of vesting results from postponement to an event uncertain, either (1) as to time, or (2) as to the person

As to the effect of conditions in suspending the vesting of trust property, we refer to the last section of the chapter on Legacies. In the present chapter we purpose to bring under review the whole case law on the subject of postponed vesting, and to deduce from the cases those rules of construction, which are not always to be found in the opinions of the judges who decide them, but which disclose themselves when the cases are analysed and compared.

The events to which postponed destinations have reference may be reduced to four heads, as follows:—*First*, where the postponement is to an event certain; *secondly*, where the succession is rendered contingent by the introduction of subsequent destinations; *thirdly*, where the succession is contingent on the birth of children; *fourthly*, where the succession is contingent on the attainment of majority, or the status of marriage.

Classification of the subject according to the different events.

SECTION I.

SIMPLE POSTPONEMENT TO AN EVENT CERTAIN.

The event to which the distribution of a succession is most usually postponed, is that of the death of a liferenter or annuitant of the subject the succession to which is in question (*a*).

(*a*) Some instances of postponement to a definite interval of time are cited in Chapter XXXVI. Section 4 (Conditions in Legacies).

L. *Fee-simple Interest burdened with a Liferent.*

The creation of a life interest has necessarily the effect of postponing the payment of the capital to the death of the liferenter, that is, to an event certain; and if the destination is absolute, the fee will vest, on the principles explained in the last section, *a morte testatoris*. To suppose that the interest of the trustor's heir-at-law or residuary legatee was sufficient to prevent the acquisition of a vested interest, would be to assume the question; for *ex hypothesi* no interest is given to these parties by the terms of the bequest, and none can accrue to them *ex lege*, unless on the supposition that the vesting of the legacy is suspended.

Legacy in
separate shares.

We may remark in the outset, that the division of the reversionary interest into shares makes no difference in the vesting; for it is settled that a bequest to a plurality of persons in shares does not import a right of survivorship; the share of each beneficiary being, in fact, a separate legacy. In the case of *Fowke v. Duncan* (a), where the effect of simple postponement of payment upon vesting was first determined after an elaborate argument, the testator bequeathed, *inter alia*, to his two nephews one-half of his personal estate, in the proportion of two-thirds to the one, and one-third to the other; and, by a separate clause, he gave a life interest to his wife of his whole personal estate, contingent on her continuing unmarried. One of the above legatees predeceased the liferentrix. It was maintained on behalf of the next of kin, on the authority of Voet and Stair (b), and two previous cases (c), that as it was uncertain whether the time at which the legacies became due—viz., the wife's death—should ever arise during the lifetime of the legatees, the case was one of those acknowledged in the civil law, where the adjection of an uncertain day rendered the legacy conditional; more especially as there was a destination over to survivors, "in the event of any of the legatees dying without issue before my will takes place." The Court, however, decided that the legacies vested in the legatees at the testator's death; and being also of opinion that the destination

If a claim of survivorship is by the terms of the will referable to the period of the Testator's death, the vesting is immediate.

(a) 1770, M. 8092. According to the doctrine of *Richardson v. Donaldson's Trs.*, *infra*, p. 349, this was a bad decision upon the construction of the words quoted.

(b) Voet, ad Pand. in tit. Quando dies leg. sec. 2; Stair, 1, 3, 7.

(c) *Edgar v. Edgar*, 1665, M. 6325; *Belches v. Belches*, 1677, M. 6327.

over was intended to take effect at the testator's death, they sustained the claim of the surviving co-legatee and his heirs to the entire half of the succession (a). In the case of *Wallace v. Wallace* (b), the same question was raised more simply upon the construction of a direction to trustees, after the decease of the longest liver of the settlor and his spouse, "to content and pay, or assign and make over, to the persons after named, the respective sums of money after specified," viz., *inter alia*, a legacy of L.1000 to Alexander Wallace, his nephew (who survived the testator, but predeceased his widow). The Court, adhering to the principle established in the case of *Duncan*, found that the legacy vested in Mr Wallace at the decease of the testator, and was transmitted to his representatives. *Jordan v. Dickson* (c) presents the circumstances of both the previous cases in combination. In regard to the residue, which was appointed to be equally divided, at the death of the widow, among four individuals *nominatim*, it was a precise counterpart of the case of *Wallace*; while in regard to the general legacies to Jean Jordan and Charles Dickson (with the benefit of survivorship), and to Mary Jordan (with a destination over), it left room for the special argument maintained in the case of *Duncan*. The Court, in this case, were of opinion that the ulterior destinations were intended to take effect at the period of the testator's death; and their effect being thus eliminated, the vesting of the legacy was also referred to the period of death.

In the two following cases reliance was placed on the circumstance of the bequest having been given to the children of a family, as indicating an intention to reserve the benefit of the provision for the survivors at the term of the expiration of the liferent. In *Forbes v. Luckie* (d), the direction was, after the death of the testator's daughter, to whom a liferent was given, to pay the residue to the whole children of her body, share and share alike. The view taken by the Court is very distinctly expressed in the following passage from the leading opinion:—"I do not think that the fee of the residue was prevented from vesting in these children, either by the

A destination to the survivors at the period of destination is not implied in a legacy to children of a family.

(a) M. 8095, 8098.

(b) *Wallace v. Wallace*, 1807, M.

"Clause," No. 6; *Grant v. Grant*, 1794, Bell, Fol. Ca. 9.

(c) *Jordan v. Dickson*, 22 June 1809, Hume, 268.

(d) *Forbes v. Luckie*, 26 Jan. 1838, 16 S. 374.

circumstance that the term of paying to each child his respective share was postponed until after the death of the *liferentrix*, who survived the testator; or by the circumstance that a trust by executors was interposed for carrying into effect the intentions of the testator; or, finally, by the circumstance that the bequest of the residue was conceived in favour of a class of persons, and not in favour of certain individuals *nominatim*" (a). The other case to which we refer (b), differed from *Forbes v. Luckie* only in that the bequest was a legacy of definite shares which were payable at the respective majorities or marriages of the children. That condition had been purified by the attainment of majority on the part of all the children before the action was raised; and the Court were unanimously of opinion that the continuance of the *liferent* could not prevent the shares from vesting at majority.

Contingent destinations affecting one part of the succession do not necessitate suspension as to the rest.

Kilgour v. Kilgour (c) carries us back to the arguments maintained at the close of the last century. The testator divided the residue of his estate into two equal shares, and, subject to his widow's *liferent*, one of the shares was appropriated to the payment of two legacies, and the other was given to the children of a class surviving the expiration of a second *liferent* interest carved out of this share. The vesting of the second half being evidently subject to postponement, it was argued that the vesting of the first half would fall to be deferred to the same term, on the ground that the testator must be presumed to have contemplated one period of division for the entire estate. The Court seem to have felt some difficulty in arriving at the decision, that the legacies constituting the first share vested *a morte testatoris*. There can be little doubt that the decisions in this and the very similar case of *Sterling v. Baird's Trs.* (d) were correct, there being nothing in the circumstances of these cases to warrant a departure from the general principle.

Vesting not affected by *liferent* or fee being given to a plurality of persons;

We proceed now to advert very briefly to the cases involving postponement of payment until the expiration of a plurality of life interests. If a *liferent* interest is given to a plurality of persons in shares, the fee being payable either to one person or to several, the

(a) Per Lord Corehouse, 16 S. 378.

(b) *Matthew v. Scott*, 21 Feb. 1844, 6 D. 718.

(c) *Kilgour v. Kilgour*, 18 Feb. 1845, 7 D. 451.

(d) *Sterling v. Baird's Trs.*, 12 Nov. 1851, 14 D. 20.

fact of the life interest being divided, will no more affect the question of vesting than the division of the fee would. *Calder v. Dickson* (a), decided by Lord Jeffrey in the Outer House, is a direct authority on both points. The settlement contemplated a division of the residue into six shares, two of which were settled by the testator in the following terms, viz.: "One-sixth on his sister A., in life-rent; and the other one-sixth on his sister B., also in life-rent; and the principal or fee of the said two-sixths so to be life-rented to be paid, on the death of any of his said sisters, to the daughters of his brother, and of his sisters C., D., and E., equally among them, share and share alike." Some of the testator's nieces having died during the currency of the life-rent, it was argued on behalf of the survivors, that as the fee was destined to them, not *nominatim* or individually, but as a class, and by description only, there was the less reason to hold that the right to it was intended to vest when the life-rent began to run, more especially as that class might not only be diminished by intermediate deaths, but increased by the birth of more nieces between the demise of the testator and that of the life-rentrix. Lord Jeffrey had no doubt that every one of the nieces surviving the testator took a vested right to a share of the fund, though the extent of the share might be affected by the existence of children *post nata*. But as in this case there was no probability of future children of the class, his Lordship, on the authority of the case of *Scheniman v. Wilson* (b), gave decree for an immediate vesting. The judgment is chiefly remarkable for the distinct enunciation which it contains of a principle, the importance of which will be seen in considering the cases referred to in our next paragraph. Referring to the elements of intention, which were, in his Lordship's opinion, material to the question of vesting, he said, "One is, that there is here no ulterior destination of the fee in the event of the failure of all the nieces to whom it is expressly provided; and the other, that there is no constitution of any accreting right to the survivors in the event of the failure of some of them, although provisions for such accreting rights are made in other

(a) *Calder v. Dickson*, 4 June 1842, 4 D. 1365. See as to vesting contingent on the birth of children, *infra*, Section III.

(b) *Scheniman v. Wilson*, 25 June 1828, 6 S. 1019.

parts of the settlement, and as to other portions of the trust property" (a).

nor by the circumstance that one of the liferenters has also an interest in the fee.

In *Smith v. Lauder* (b), and *Maxwell v. Wylie* (c), a liferent interest was given to certain persons and the survivor of them; and it was held that this did not suspend the vesting of the fee, although it involved the continuance of a separate usufructuary interest for two lives. *Maxwell's* case involved the specialty, that the residuary interest liferented by the testator's sisters, as already explained, was given in fee to the testator's *next of kin*, to whom the liferenters belonged. The Court held that the existence of a liferent interest was not incompatible with that of a fee in the same person; and on the question of intention, it was thought that it would be too violent a construction to hold that the testator's sisters were disinherited merely because they were made recipients of the life interest, more especially as they had been expressly instituted heirs of the rever-sionary estate, in their character of next of kin (d).

SECTION II.

SUSPENSION OF VESTING, CONSEQUENT UPON THE CREATION OF CONTINGENT DESTINATIONS.

I. *Reversionary Interest with a Destination over or Clause of Survivorship.*

Bequest contingent on the Legatee's surviving the period of destination does not vest.

As it is an elementary principle in the law of vesting, that a condition annexed to a gift prevents the acquisition of a vested right prior to the purification of the condition,—it follows by necessary inference, that wherever the payment of a capital sum is made truly contingent upon the uncertain event of the legatee's survivance of the period of distribution, the legacy will not vest until his survivance is an accomplished fact, but will lapse in case of his pre-decease. This simple proposition might be illustrated by supposing the case of a legacy payable to A. B., "in the event of his surviving

(a) 4 D. 1367. See also *Rutherford v. Turnbull*, 30 May 1821, 1 S. 37.

(b) *Smith v. Lauder*, 30 May 1834, 12 S. 646.

(c) *Maxwell v. Wylie*, 25 May 1837, 15 S. 1005.

(d) 15 S. 1011, per Lord Gillies.

C. D.," to whom a liferent is given. But this is not a style of contingent destination likely to occur in practice. The form in which an equitable interest is rendered contingent on the fiar's survivance of the period of distribution, is by the adjection of a destination over to another party, to take effect in the event of the institute failing to survive the term of payment; or, in the case of legacies to a plurality of persons, by taking the destination to these parties jointly, or to the survivors of them.

When no period of failure is specified, the natural construction of words importing a destination over or right of survivorship, is that which makes them have reference to the period of distribution; and such is the received construction according to the decisions of our Courts. Those enigmatical remarks upon the importance of the element of "intention" that are of frequent recurrence in the Reports, mean only that where a settlor has *said* that a destination over is to take effect in the event of the legatee predeceasing *him*, the vesting is immediate. But unless the legacy is given over with reference to some *specified* event, the presumption is that the contingent interest of the substituted legatee remains until the trust expires.

Words of survivorship are referable to the period of distribution, unless a contrary intention is manifested.

The leading case, having regard to the attention and time bestowed upon it in its different stages, as well as to the eminence of the Court by which the ultimate decision was pronounced, is *Richardson v. Donaldson's Trustees* (a). The estate was burdened with a liferent of the whole residue in favour of the settlor's widow, and the ultimate purpose of the trust was expressed in the following terms:—"I will and direct the said trustees to account for, pay and divide, or convey the whole residue and remainder of my property, subjects, means, and estate, heritable and moveable, real and personal, or proceeds thereof, after the death of the last liver of me and my said wife, equally to and among [five persons designated], equally, or share and share alike, and to their respective heirs or assignees, declaring that if any of said residuary legatees die without leaving lawful issue *before his or her share vest* in the party or parties so deceasing, the same shall belong to, and be divided equally, or share and share alike, among the survivors of my said grandnephews, etc."

Richardson v. Donaldson's Trustees.

(a) *Richardson v. Donaldson's Trs.*, the whole Court, 20 July 1860, 22 D. decided 14th Feb. 1862, by the House of Lords, on appeal from a judgment of 1527.

The testator was survived by his widow; two of the residuary legatees died during the currency of her life interest; and the question was, whether any interest vested in the deceased legatees. A majority of the judges of the Court of Session, putting a positive construction upon the words in italics, held that the testator meant by that expression to refer the operation of the clause of survivorship to the *usual* period of vesting, namely, his own death. But the Court of Appeal, taking, as we think, a sounder view of their meaning, held that there was no specification of a determinate period of vesting, and that the presumption was for postponement.

Lord West-
bury's opinion.

The Lord Chancellor (*a*), adopting in substance the opinion of the Lord Justice-Clerk, observed that it was a settled rule, and one which had been established both in England and in Scotland, that when words of survivorship were used in a will, and no period was specified, it was to be presumed that the period meant was that for the distribution of the funds. When, therefore, a testator gave a sum, or the residue of his estate, to be paid among a number of persons, and he then referred to the contingency of one or more of those persons dying, and then he gave the same sum to the survivors, without saying at what period the survivorship was to be computed, then on that simple gift those who survived the death of the testator were to take, because in that case the death of the testator would be the period of distribution. Again, by parity of reasoning, where the sum was to be given to a person for life, and after his death the sum was to be distributed among a class of persons, or the survivors, the rule was, that as the period of distribution in that case would be the death of the *liferentrix*, then the survivorship was to be calculated at that date; and accordingly, until the death of the *liferentrix*, the shares did not vest in the surviving legatees. The period of distribution was thus the period for ascertaining who were the survivors intended to take.

Destination to
the "Heirs and
Assignees"
of the Legatee
is not a con-
tingent desti-
nation.

Before entering more fully into the cases upon the construction of contingent destinations, it will be necessary to premise that a destination to heirs, or heirs and assignees, of the legatee, is not in point of principle a destination over, to the effect of leaving the vesting of the reversionary interest in suspense during the subsistence of the life interest; the heir in contemplation of law is

(a) Lord Westbury.

identified with the institute, and is not held to be nominated in the character of a favoured person. Destinations to heirs are usually inserted with the view of preventing a lapse, in the event of the legatee predeceasing the testator. After there is a possibility of the succession vesting, these words have no meaning, or mean only that the succession shall vest; being simply the expression of the legal doctrine that a vested interest transmits to heirs and assignees (*a*). Accordingly, it will be seen from the class of cases discussed in the subsequent sections, that a destination to heirs and assignees, so far from being regarded as a contingent destination, is held to create a strong presumption that an immediate vested interest was intended to be given.

Thus, where a lady conveyed the sum of L.1000 to trustees, with a direction to apply the yearly interest as an annuity to her nephew during his life, the principal to be "divided and applied" to certain other legatees named, "and to their respective heirs in case of their death," and one of these legatees, Mrs Brockie, after surviving the testatrix, died before the expiration of the life interest, it was held that her legacy had vested on the death of the testatrix, and had been carried by Mrs Brockie's general disposition in favour of her husband, to the exclusion of her next of kin (*b*). "The mere mention of her heirs," said Lord Jeffrey, Ordinary, "can never, after the cases of *Crawford* and *Leitch*, warrant the supposition that the trust was created in any degree for the purpose of protecting the conditional institution of unknown parties, by depriving the only named fiar of the power of disposal; it being manifest, in the Lord Ordinary's apprehension, that these words were introduced, not with any view of suspending the vesting, but solely to meet the contingency of Mrs Brockie herself predeceasing the testator, and the legacy consequently lapsing" (*c*). It does not detract from the weight of this decision, that the cases of *Russell v. Crawford's Trs.* (*d*) and *Smith v. Leitch* (*e*), on which the Lord Ordinary founded, where legacies were held to have vested in a *last substitute*, were not very apposite to the subject of decision,—a circumstance

Marchbanks v. Brockie.

Lord Jeffrey's opinion.

(*a*) See joint opinion in *Richardson's* case, 22 D. 1536, which on this point is not affected by the reversal.

(*b*) *Marchbanks v. Brockie*, 18 Feb. 1836, 14 S. 521.

(*c*) 14 S. 524.

(*d*) *Russell v. Crawford's Trs.*, 6 Feb. 1824, F. C.

(*e*) *Smith v. Leitch*, 2 June 1826, 4 S. 669, and 3 W & S. 366.

Meaning of
destination to
Heirs.

which was noticed by the Lord J.-C. Boyle in moving the affirmance of the Lord Ordinary's interlocutor. In the recent case of *Cochrane v. Cochrane's Executors* (a), where a legacy of L.150 and a share of residue were made payable to John Cochrane, "or his heirs," six months after the testator's death, and when the same was freed from the liferent right of his spouse, the case was treated as one of first impression; the Lord President M'Neill remarking, as to the meaning of the phrase "or his heirs," that it was only introduced for the purpose of preventing the lapsing of the legacy. We may observe, in conclusion, that the principle of decision in the cases of *Marchbanks* and *Cochrane* is quite consistent with the leading case of *Bell v. Cheape* (b), which decided that a legacy to a party, "his heirs and assignees," was not assignable pending the period during which the vesting of the legacy was suspended from the operation of other causes, but did not in any way imply that the destination to heirs and assignees contributed to produce the suspension.

Subsequent
destination to
Legatee's
Children.

A destination to the "children" of a legatee must be construed upon different principles from a destination to heirs. Where the legatee is not within the degree of relationship to the testator in which a conditional institution would be implied, it is clear that an express conditional institution of the legatee's children must be regarded as a contingent destination; but where, in consequence of the legatee's near relationship to the testator, his children would be entitled to claim the succession as implied conditional institutes upon the death of the testator, the presumption is that words of conditional institution are inserted merely *ex cautolâ*, and not for the purpose of limiting the parent's power of assignment. It is true, the implied condition, *Si sine liberis decesserit*, is sufficient to preserve the interest of the legatee's children until the term of vesting, where that is deferred to a period subsequent to the testator's death; but the suspension must result from some other cause, and not from the implied condition itself. No good reason can be assigned for giving a different meaning or effect to this condition when it forms the subject of an express provision—*expressio eorum quæ taciti insunt nihil operatur*. The view here taken is supported by the

(a) *Cochrane v. Cochrane's Exrs.*,
29 Nov. 1854, 17 D. 103.

(b) *Bell v. Cheape*, 21 May 1845, 7
D. 614.

authority of two well-considered decisions (*a*). However, where marriage-contract provisions are so expressed as to give a vested interest to the children *prior* to the dissolution of the marriage, an express conditional institution of the issue of such children clearly gives a vested interest to the children's issue in the event of the parents predeceasing the period of vesting, contrary to the principle of the implied condition, which only operates in favour of surviving issue (*b*).

In *Robson v. Shirreff* (*c*), a destination of residue to children on the death of the longest liver of the spouses, with remainder to the grantor's husband and sisters on failure of issue, was held to have vested in the children *a morte testatoris*; but the decision turned upon the construction of some rather complex provisions, and the construction of the alterior destination was not very material to the real question at issue between the parties. The case of *Marnock v. Wilson* (*d*), where heritable and other property was destined to a lady in liferent, and to her four daughters and their respective heirs and assignees in fee, with the benefit of survivorship, may also be considered an exceptional case. In this instance there was no creation of a trust; and the Court, in giving the fee to the children who survived the testatrix, proceeded upon the rules of construction applicable to heritable destinations, where the presumption is always adverse to the suspension of the beneficial interest (*e*).

Exceptional cases considered.

We proceed now to take a rapid survey of the cases in which the Court has applied the established principle, that contingent limitations are suspensive of vesting, to destinations where the fee is subject to the burden of a life interest. In the important case of *Wright v. Ogilvie* (*f*), where there was a series of substitutions on failure of the legatee, the judges of the First Division were unani-

Examples of the suspension of vesting consequent upon a destination over.

(*a*) *Pretty v. Newbigging*, 1 Mar. 1854, 16 D. 667; *Foulis v. Foulis*, 3 Feb. 1857, 19 D. 362. See these cases stated, *infra*, p. 381.

(*b*) See the distinction stated by Prof. Bell, Pr. § 1782.

(*c*) *Robson v. Shirreff*, 20 July 1853, 15 D. 297. Compare this with *Carter v. M^rIntosh*, 20 Mar. 1862, 24 D. 927, where the effect of words of survivorship is distinguished from that of a mere institution of issue.

(*d*) *Marnock v. Wilson*, 2 Mar. 1855, 17 D. 536.

(*e*) Per Lord Deas, 17 D. 541. This case will probably be considered as overruled, in consequence of the recent decision of the House of Lords, *supra*, p. 349.

(*f*) *Wright v. Ogilvie*, 9 July 1840, 2 D. 1537. See also *Home v. Home*, 28 Jan. 1807, Hume 530; *Jordan v. Dickson*, 22 June 1809, Hume, 268; *Leitch v. Leitch's Trs.*, 3 W. & S. 366, and cases cited, *infra*, p. 376.

mously of opinion that the capital of the trust fund could not vest until the death of the trustor's widow, who held a life interest in the estate; and in *Ross v. King* (a), the same result was held to follow, in consequence of the institution of a series of heirs in a trust conveyance of heritable property. The doctrine, that a destination over is incompatible with the acquisition of a vested interest at the death of the testator, had already been recognised by the Second Division in the case of a trust settlement of moveable property for behoof of the testator's daughter in liferent, and her children in fee, with remainder to the testator's heirs and assignees whatsoever (b); and the judgment in this case, which proceeded on a careful review of all the previous decisions, has been frequently referred to as a ruling authority.

Examples of suspension consequent upon clause of survivorship.

Influence of intention in this class of cases.

Some indication of the principle, that a clause of survivorship is virtually a contingent destination, may be found in *Bloomfield v. Campbell* (c), and the other cases noted below; but the first unequivocal recognition of the doctrine in connection with the class of cases under consideration, will be found in Lord Medwyn's opinion in *Robertson v. Richardson* (d)—a pure case of residuary destination to nephews and nieces in liferent, with remainder to their children in fee, and to the survivors in case of death without issue. That learned judge, in delivering the judgment of the Court, took occasion to observe, that in the case of a trust with an ulterior destination, *if there were no indication of an opposite intention*, the Court would not easily allow that destination to be defeated by holding the subject of the bequest to vest. If there were no trust, the presumption against immediate vesting was weaker. A residue, he thought, would not vest so easily as a bequest or legacy; the one being a definite sum, the other being indefinite, and depending upon an ultimate result; the payment of the one being *ex sua natura* immediate, whereas the other is necessarily postponed, and may easily be made contingent (e).

The late Lord Justice-Clerk was very much averse to the recognition of distinctive principle in this class of cases, interfering as it

(a) *Ross v. King*, 22 June 1847, 9 D. 1327. 1838, 1 D. 69; and *Clelland v. Gray*, 15 June 1839, 1 D. 1031.

(b) *Mowbray v. Scougall*, 9 July 1834, 12 S. 911. (d) *Robertson v. Richardson*, 6 June 1843, 5 D. 1117.

(c) *Bloomfield v. Campbell*, 24 Nov. (e) 5 D. 1126.

would do with his favourite notion of referring such questions to the intention of the testator, construed *per arbitrium judicis*; and he gave expression to his dissatisfaction in the subsequent case of *Wright v. Fraser* (a). But the suspensive efficacy of survivorship clauses was very soon after established, and extended to legacies as well as residuary bequests, by the decision of the First Division in *Newton v. Thomson* (b). The settlement gave the interest of L.1000 to a lady as a liferent annuity, the one-half of the capital to be equally divided between her two nieces, "or the survivor of them." In the rubric it is somewhat ambiguously stated that the interest of one of the nieces who predeceased the liferentrix, after conveying all her property to her husband, was held to have *lapsed*. But the fact is, that the Court had no difficulty in sustaining the claim of the survivor to the whole fund; for, as Lord Fullerton observed, a direction of this kind necessarily excluded the possibility of one of the parties defeating, by any deed prior to the extinction of the liferent, the absolute right attached to survivance by the will of the testator; the survivance in question not being the survivance of both legatees at the time of the testator's death, but the survivance of one legatee in relation to the other.

The interpretation of the destination in *Richardson's Trustee v. Cope* (c) was thought to be attended with considerable difficulty, by reason of the circumstance that, after limiting a liferent of residue to Mary Richardson, a married lady, and the fee to her children, Andrew and Catherine, with a clause of survivorship in the event (which happened) of the death of one of them without issue, the testator proceeded to declare, that in case the said children or the survivor should not have arrived at majority when the liferent expired, the trustees were only to pay them the interest during minority, with a further destination in the event of either of them dying childless during the period of nonage. The Second Division adhered by a unanimous judgment to the principle laid down in *Newton's* case, and found that "the whole residue must be paid to the survivor at the time of the death of the said Mary Richardson

*Richardson's
Tr. v. Cope.*

(a) *Wright v. Fraser*, 16 Nov. 1848,
6 D. 78.

(c) *Richardson's Tr. v. Cope*, 8 Mar.
1850, 12 D. 805.

(b) *Newton v. Thomson*, 27 Jan.
1849, 11 D. 452.

(the *liferentrix*), in consequence of the death of Catherine, without issue, before the term of payment" (a).

Whether Interest vests when all the joint Legatees have predeceased period of distribution.

The adjection of a clause of survivorship is now held to create so absolute a presumption for postponement, that although all the legatees may have predeceased the *liferenter*, and there can therefore be no survivor in a literal sense, the Court will not by anticipation declare the extent of their rights, pending the subsistence of the life interest (b). How far the beneficiaries may in such circumstances anticipate the period of payment by mutual agreement will be the subject of consideration in the next Chapter.

Variations in the period of postponement.

In several of the decided cases the destination was complicated by the circumstance of the *liferent* interest being given to a plurality of persons successively (c), or jointly and to the longest liver. Such variations in the *liferent* destination can never affect the decision of the question, whether the beneficial interest in the capital has vested *a morte testatoris*. *Buchanan v. Downie* (d) and *Vines v. Hillou* (e) are examples of suspended vesting during the currency of joint *liferents*; the cause of suspension being in the first case a destination over, and in the second, a right of survivorship. In *Robertson v. Houston* (f), where the destination occurred in a marriage-contract giving the *liferent* to the longest liver of the spouses and the fee to the surviving children, the period of survivance was held, in accordance with settled principle, to be at the death of the longest liver, which, it was observed, must be the terminus in view of the testator in a deed which derived its whole operative qualities from the event of survivorship (g).

In such cases suspension of vesting is not

II. *Fee-simple Interest burdened with a Fixed Annuity.*

There does not seem to be any valid reason for inferring a suspension of vesting from the fact of a bequest of residue being bur-

(a) 12 D. 867. See also *Walker v. Park*, 20 Jan. 1859, 21 D. 286, where the effect of a clause of survivorship was explained by Lord Justice-Clerk Inglis (21 D. 291).

(b) 20 D. 1210, per Lord Pr. McNeill, in *Cattanach v. Thom's Exr.*, 2 July 1858, 20 D. 1206 (Second point). *Sup.* 371.

(c) *Clelland v. Gray*, 15 June 1839,

1 D. 1031; *Wright v. Fraser*, 16 Nov. 1843, 6 D. 78.

(d) *Buchanan v. Downie*, 12 Feb. 1830, 8 S. 516.

(e) *Vines v. Hillou*, 13 July 1860, 22 D. 1436.

(f) *Robertson v. Houston*, 28 May 1858, 20 D. 989.

(g) 20 D. 993, per Lord Ivory.

dened with an annuity of moderate amount; for, although the trustees may in certain cases be under an obligation to retain a portion of the capital in their hands as a security for the annuity,—in which case the fund so set apart will fall ultimately into the residue (a),—yet an annuity, especially when charged on residue, does not necessarily deprive the fiar of the usufruct of his estate, but, on the contrary, may be cleared off by means of a present payment, or secured by an adequate investment (b). Accordingly, it was observed by Lord Cranworth, in *Pursell v. Newbigging* (c), that it would require much stronger language to satisfy the Court that there was an intention to suspend in the case of an annuity than in that of a liferent.

presumed; because annuity may be cleared off.

Of course, where there is no ulterior destination of the fee, as in the case of *Kerr v. James* (d), the fee will vest *a morte*, in accordance with the principles that have been already fully explained. The distinction in the law of vesting between annuity and liferent cases, only arises in the event of the deed containing an ulterior destination; in which case, there is not the same absolute presumption for suspension during the life of the annuitant that would exist in the case of a liferenter. Nor will a clause by which the payment of the capital is postponed to the death of the annuitant, even when coupled with a destination over, or to survivors, be decisive of the matter of vesting; for the question being mainly one of degree, the Court must be guided by the apparent intention of the testator (e).

Where distribution expressly postponed, vesting resolves into question of intention.

In addition to the cases of *Pursell*, *Kerr*, and *Watson*, already cited—in all of which the residue was held to have vested *a morte testatoris*, notwithstanding the addition of a destination over,—we may refer to the two earlier cases of *Dobie v. Milne* (f) and *Bruce v. Moir* (g), the one relating to a provision of heritage, the other to

Examples of immediate vesting.

(a) *Davidson v. Dobie*, and *Grieve's* case, *infra*.

(b) *Wilson v. Beveridge*, 31 Jan. 1833, 11 S. 343; *Davidson v. Dobie*, 13 Feb. 1828, 6 S. 536; *Grieve's Trs. v. Bethune*, 9 June 1830, 8 S. 896; *Forsyth v. Kilgour*, 15 Dec. 1854, 17 D. 208.

(c) *Pursell v. Newbigging*, 10 May 1855, 2 Macq. 276.

(d) *Kerr v. James*, 12 Feb. 1858, 20 D. 562.

(e) *Watson v. Macdougall*, 4 June 1856, 18 D. 971.

(f) *Dobie v. Milne*, 13 Feb. 1828, 6 S. 536.

(g) *Bruce v. Moir*, 28 June 1833, 11 S. 799.

the residue of moveable estate, and in which annuities were held to create no bar to the subsistence of an immediate vested interest in the fiar. In the more recent cases of *L' Amy v. Nicolson's Trs.* (a) and *Dickson v. Halbert* (b), the presumption was also held to be for immediate vesting. In the former case accordingly, the legatees were found entitled to an immediate payment, upon the surviving annuitant agreeing to renounce her interest.

Examples of
suspended
vesting in vir-
tue of Testa-
tor's intention.

The cases in which the vesting of legacies has been held to be suspended during the currency of annuities, have generally proceeded upon some specialty indicative of intention. In the cases of *Provan* and *Johnston*, which we shall afterwards have occasion to consider (c), the annuities were settled on married ladies; and the fee, being destined to their children, was necessarily retained to preserve the interest of children *nascituri*. The same explanation may be given of the case of *Thornhill v. Macpherson* (d). In other cases the vesting was held to be suspended, because, by the express terms of the settlement, the fund was to be paid over, on the death of the annuitant, to the surviving institute *at that time* (e). So also, in *Pearson v. Cassamajor* (f), a direction to pay certain parties, or the *survivors* of them, when the capital sums "become tangible by the death of the said annuitants respectively," was justly held to import a postponement of vesting as well as of payment. The subsequent appeal and application of the judgment (g) did not affect the question of vesting. Those cases, however, are all exceptional in their character, and do not invalidate the proposition, that the creation of annuities affords a very slender presumption for suspended vesting.

III. Vesting of Postponed Life Interests.

Postponed
liferents are
contingent on
survivance,
and the right
does not vest.

A liferent being in its own nature a purely personal privilege, incapable of transmission to heirs, and *ex vi termini* contingent on

(a) *L' Amy v. Nicolson's Trs.*, 5 Dec. 1850, 13 D. 240.

(b) *Dickson v. Halbert*, 13 Feb. 1851, 13 D. 675.

(c) *Provan v. Provan*; *Johnston v. Johnston*, stated *infra*, p. 364.

(d) *Thornhill v. Macpherson*, 20 Jan. 1841, 3 D. 394.

(e) *Ferrie v. Ferrie*, 23 Feb. 1849, 11 D. 704; *Robertson v. Davidson*, 24 Nov. 1846, 9 D. 152.

(f) *Pearson v. Cassamajor*, 16 Dec. 1836, 15 S. 275.

(g) See 8 Cl. & Fin. 94; 2 D. 1020, 1 Rob. 217.

the survivance of the usufructuary, can never be acquired as a vested right until the commencement of the period of actual enjoyment (a). Accordingly, a contingent or postponed liferent cannot vest until the occurrence of the event upon which the opening of the succession is contingent. For example, if one liferenter is substituted for another, his right will vest upon the extinction of the previous usufructuary interest; and the death of one of two joint liferenters will convert the survivor's *pro indiviso* half share into a simple liferent. The principle is illustrated by the case of *Thom v. Thom* (b), where lands were conveyed by ante-nuptial contract to the wife's father in liferent, and at his death to the spouses in conjunct fee and liferent, and to the longest liver in liferent for the husband his liferent use only; and the marriage was dissolved by the wife being divorced during her father's lifetime. The Court, applying the rule laid down by Stair and Bankton, that the injured party's rights consequent upon divorce are the same as would emerge in the event of survivance, found that the husband was entitled, after the death of his father-in-law, to the entire usufruct of the estate.

In liferents to several parties jointly, the right of survivorship is implied; and the fee will accordingly not open until the death of the longest liver. On the other hand, a conveyance to a plurality of persons for their liferent use severally, or in shares, will, according to the received rules of construction, vest only a *pro indiviso* interest in each of the liferenters, defeasible upon his death. In the case of *Tulloch v. Welsh*, however, where the conveyance was to a brother and sister in liferent, for their liferent use allennary, with a destination over, subject to the declaration that the yearly rents, profits, etc., should be paid to the liferenters during their lifetime, share and share alike, Lord Moncreiff held that a right of accrescion was intended to be given, by reason of certain words in the ulterior destination, indicating an intention that the fee should not open until the death of the longest liver (c). As to the mode of vesting, the principle seems to be that each

Vesting of
joint liferents
and survivor-
ship.

(a) *Findlay v. Macintyre*, 11 Dec. 1849, 12 D. 325.

(c) *Tulloch v. Welsh*, 23 Nov. 1838, 1 D. 94.

(b) *Thom v. Thom*, 11 June 1852, 14 D. 861.

liferenter has a vested but defeasible right to his own share, and a spes successionis to the share of his co-liferenter. The cases to which reference has been made in connection with the subject of the postponed vesting of fee-simple interests, present many instances of the creation of liferent rights jointly and in succession. Examples of the usual style of conjunct liferent destinations in trust settlements will be found in the cases noted below (a).

III. *Effect of a Power of Disposal in suspending that Vesting.*

In the general case, the fee does not vest until the deaths of the Granter and Donee.

To avoid unnecessary repetition, we refer to the previous chapter on the constitution and execution of powers of this description (b), from which it will be seen that the existence of a power of disposal, however broad, does not, when accompanied by a destination over in default of exercise of the faculty, vest a right of fee in the donee of the power. Such being the case, it is obvious that the vesting of the fee (which is conditional on the exercise of the power) must remain suspended during the lives of the granter and donee of the power. Such at least appears to be the necessary result, where a trustee gives a power of disposal to a liferenter, to be exercised by settlement or disposition *mortis causa* (c). But if the donee has exercised the power by an irrevocable deed, his liferent will not prevent the fee from vesting. A power of disposal extending over a limited portion of a succession will not have the effect of suspending the vesting of the residue, as to which no such power has been given (d).

Effect of a failure to execute the power.

It is scarcely necessary to add, that, in the event of the death of the liferenter without having executed the power, the fund will not vest in his representatives, but in the next of kin or residuary legatees of the granter of the power (e). And even a grant of the liferent of a succession, coupled with a power of appropriating so much of the capital as may be necessary for the maintenance of the grantee, does not vest the fee, as regards his succession, in the

(a) *Johnston v. Johnston*, 9 June 1858, 20 D. 989; *Marder's Trs. v. Marder*, 30 Mar. 1853, 15 D. 633.
 (d) See *Donaldson's Trs. v. Macdougall*, 20 July 1860, 22 D. 1527.
 (e) *Dill v. Houston's Trs.*, 7 Dec. 1839, 2 D. 214, 2 Rob. 298; *Alves v. Alves*, 8 Mar. 1861, 23 D. 712.

(b) Chapter XXII. (I. 500).
 (c) *Robertson v. Houston*, 28 May

liferenter; and, accordingly, the unappropriated surplus will fall to the grantor's heirs on the expiration of the life interest (a).

It appears to be settled by authority, that the existence of a power of distribution unexercised, does not prevent the immediate acquisition of a vested interest by the class amongst whom the succession is to be distributed (b); although here the extent of the individual interests is contingent not only on the number of persons that may be comprehended in the class at some future time, but also on the discretion of the donee of the power. In such cases, it seems an abuse of language to speak of the individual members of the class taking a vested interest in the succession. However, it is settled that the individual interest does vest, though the extent of the interest is wholly uncertain (c). It would seem that a power of distribution and selection from an indefinite class of persons may be competently exercised before the arrival of the period of division; and, in that case, we presume the exercise of the power would create a vested interest in the selected beneficiaries (d).

Whether the vesting of a family provision is affected by a power of distribution.

SECTION III.

DOCTRINE OF PROVISIONAL VESTING WHEN THE SUCCESSION IS CONTINGENT ON THE BIRTH OF CHILDREN.

The rule applicable to this class of cases is, that a provision to all the children of a family vests in the children as a class, from the time that the settlement comes into operation; but that the right of any individual child to a definite share is provisional, and subject to the emerging claims of *post natal*. The period when the succession vests in the children as a class, depends on the character of the provision, and on the party from whom it proceeds. Legacies, for example, vest at the death of the testator, and the representatives of children predeceasing that event will have no claim (e).

Provisions to a family vest in the family as a class according to ordinary rules, notwithstanding the possibility of future children.

(a) *Sprot v. Pennycook*, 12 June 1855, 17 D. 840. 16 D. 218; *Fyffe v. Fyffe*, 13 July 1841, 3 D. 1205.

(b) *Cowan v. Crawford*, 20 Jan. 1837, 15 S. 399; *Watson v. Marjoribanks*, 17 Feb. 1837, 15 S. 587; Lord Rutherford's Note in *Baillie v. Seton*,

(c) See next section.

(d) *M'Cormack v. Barber*, 25 Jan. 1861, 23 D. 398.

(e) *Biggar's Tr. v. Biggar*, 17 Nov.

Marriage-contract provisions unsecured, and payable at the dissolution of the marriage, follow the same rule as legacies. Estate conveyed by marriage-contract or relative disposition to trustees for behoof of the children of the family, vests at the birth of the first-born child provisionally; and the existence of a liferent right in one or both of the parents, according to the usual tenor of such destinations, does not suspend the vesting of the fee in the child or children of the marriage (a). A direct conveyance to the spouses, restricted to liferent use, and to the children in fee, contained in a marriage-contract or relative disposition, is governed by the same rules as a conveyance to trustees, on the principle that the party having the liferent interest is a trustee for the children (b).

Beattie's Trs. v. Cooper's Trs.

These principles may be collected with tolerable certainty from the decisions prior to 1862; but as the questions involved in them had never been very directly raised, the First Division, in the case of *Beattie's Trustees* (c), took occasion then to reconsider the whole law in regard to the vesting of equitable interests given to unborn children. The propositions laid down in the preceding paragraph embrace the substance of the judgment of the Court in that case. Elements of difficulty which attend the explication of the rights of children's representatives in consequence of the adoption of the rule of immediate vesting, are forcibly pointed out in the opinion of Lord Curriehill, by whom the judgment was delivered (d). Nevertheless, both on principle and authority, their Lordships were of opinion that the uncertainty as to the existence of future children was no bar to the acquisition of a vested and indefeasible right in those who were already born. The cases upon which reliance was placed were *Falconer v. Moncrieff* (e), where the children's right was recognised during the subsistence of the marriage in a question with the father's creditors; *Watson v.*

An interest vests in each individual child from birth or from the period when the settlement takes effect.

1858, 21 D. 4; *Wood v. Wood*, 18 Jan. 1861, 23 D. 338.

(a) *Beattie's Trs. v. Cooper's Trs.*, *infra*.

(b) See also *Fyffe's case*, 3 D. 1205 (Legacy to a person and his "family").

(c) *Beattie's Trs. v. Cooper's Trs.*, 14 Feb. 1862, 24 D. 535.

(d) 24 D. 534.

(e) *Falconer v. Moncrieff*, 20 Jan. 1825, 3 S. 455. The point decided here seems to have been substantially the same which occurred in the leading cases of *Herries, Farquhar, & Co., Browning, and Goddard*; as to which see Chapter XXXV., p. 198.

Marjoribanks (a), a leading case, where a deed, in execution of a power of division among children, was held to be inept, on the ground of the omission to appoint a share to the representatives of a child who died during the subsistence of the marriage; and a dictum of Lord Braxfield (b), to the effect that a "fiduciary fee" has all the qualities of an equitable interest under a trust. To these we may add Lord Jeffrey's decision in *Calder v. Dickson*, in which the nature of the interest of children *post nata* was much considered (c); and the concurring judgments of Lord Fullerton and the First Division in *Forbes v. Luckie* (d).

As a consequence of the principle that interests given to a family vest in the children, although the succession opens during the subsistence of the marriage, it follows that, in the ultimate division, *e.g.*, at the dissolution of the marriage, the legal (e) or testamentary (f) representatives of children who were in existence after the right vested, may claim a share.

Right of representatives of children predeceasing the period of division.

Where the period of distribution is fixed by the testator himself to be at a time when there is a possibility of the birth of future children, the children in existence at that time have a right to call upon the trustee to denude in their favour, and the Court will not impose upon them the condition of finding caution (g). If no period of distribution is fixed, it would seem that the trust must be kept up until the dissolution of the marriage, or the death of the parent to whose children the provision is granted. However, where the provision has been to all the children of a lady of advanced age, the Courts have authorized payment to be made to the existing children if any (h), or to the conditional institute (i) upon caution to repeat. A bequest to the lawful heirs of a party was held to mean those alive at the testator's death; and the executors were not entitled

At what period the division of the fund should take place.

(a) *Watson v. Marjoribanks*, 17 Feb. 1837, 15 S. 586.

(b) In *Preston v. Welwood*, 1791, Bell's Oct. Ca. 198.

(c) *Calder v. Dickson*, 4 June 1842, 4 D. 1365; and see *Scott v. Scott*, 7 Bell, 157, per Lord Brougham.

(d) *Forbes v. Luckie*, 26 Jan. 1838, 16 S. 374.

(e) *Beattie's Trs. v. Cooper's Trs.*, *supra*, 2d and 5th points; *Watson v. Marjoribanks*, *supra*.

(f) *Forbes v. Luckie*, *supra*.

(g) *Biggar's Trs. v. Biggar*, 17 Nov. 1858, 21 D. 4; *Wood v. Wood*, *supra*.

(h) *Scheniman v. Wilson*, 25 June 1828, 6 S. 1019. In *Hardman v. Guthrie*, 6 June 1828, 6 S. 920, the children were, in somewhat similar circumstances, held entitled to an alimentary allowance out of the fund.

(i) *Blackwood's case*, 11 S. 699.

to retain the fund in order to provide for the possibility of the birth of other heirs in the same degree of relationship (a).

Effect of survivorship clauses, etc., in causing a suspension.

The vesting of a provision to children of a family may be suspended by the operation of a destination over to survivors, or to other parties, according to the principle, and subject to the limitations stated in the last section. Where there is a liferent right extending over the entire subject, ulterior destinations will be held to refer to the termination of the liferent, and the vesting will be suspended until that time (b). In the case of annuities, the presumption rather is for immediate vesting (c). The first point was the subject of consideration by the whole Court in *Boyle v. E. of Glasgow's Trs.* (d); though in reality the case could not be attended with any difficulty, since, by the terms of the destination, the fee was given on the death of the surviving spouse to the children *then existing*.

Liferent and fee, with destination over.

Fee burdened with an annuity.

In regard to annuities, the most authoritative decision is *Pursell v. Newbigging*, as decided on appeal (e), where Lords Cranworth and St Leonards laid down, that the existence of an annuity charged on the fee would not, in ordinary circumstances, necessitate a suspension. In the previous cases of *Provan v. Provan* (f) and *Johnston v. Johnston* (g), where the vesting of provisions in favour of a class of children was held to be suspended, the period of distribution was expressly postponed, and payment was directed to be made to the survivors in the one case, and in the other to the survivors and their heirs; so that the contingent destination was, by the express terms of the deed, made referable to the expiration of the annuity.

Effect of a conditional institution of issue of members of the class.

It is a frequent subject of provision in bequests to children of a family, that in the event of any of the children dying and leaving issue, such issue shall succeed to the parents. Where the bequest vests from birth in the children as a class, this clause makes no alteration on the rights of the issue of a deceased child; where, on the

(a) *Pearson v. Corrie*, 28 June 1825, 4 S. 119.

(b) See *Broomfield v. Campbell*, 24 Nov. 1835, 14 S. 51, where the provisions were declared not to be payable until after the father's death, and the surviving children were conditionally instituted; *Stirling v. Baird's Trs.*, 12 Nov. 1851, 14 D. 20; *Boyle v. Earl of*

Glasgow's Trs., 14 May 1858, 20 D. 925.

(c) *Pursell v. Newbigging*, *infra*.

(d) *Supra*, note (b).

(e) *Pursell v. Newbigging*, 10 May 1855, 2 Macq. 273; see 276.

(f) *Provan v. Provan*, 14 Jan. 1840, 2 D. 298.

(g) *Johnston v. Johnston*, 9 June 1840, 2 D. 1038.

other hand, the term of vesting is postponed and a child predeceases that term, the effect of the clause seems to be exactly equivalent to that of the implied condition *si sine liberis*. A clause instituting the issue of children dying before a certain term is not to be construed as a disinherison of the heirs of those children who die *without issue*; or, which is the same thing, as implying that the shares of those who die without issue do not vest (a).

The subsistence of a power of *division* does not prevent the fund from vesting in the class amongst whom it is to be divided, where these are children of a family (b). But it is otherwise in the case of a general power to distribute amongst relatives, which necessarily implies a right of selection as well as of division (c).

Powers of
division.

It deserves to be considered, whether destinations to children of a family should not be regarded as joint destinations, passing to survivors by accrescion, subject to the claims of issue in virtue of the condition *si sine liberis*. This is a simpler view than that which was taken in *Beattie's Trs.*; and it is supported by at least one case, *Burnett v. Burnett* (d), where a fund provided to the younger children of a landed proprietor was held to vest in the *surviving* younger children, to the exclusion of the eldest son, who, on the alternative view, would have succeeded to a portion of the shares of children who predeceased the period of distribution.

SECTION IV.

SUSPENSION OF VESTING WHERE THE SUCCESSION IS CONTINGENT UPON THE ATTAINMENT OF MAJORITY OR MARRIAGE.

Next to the preservation of life interests, the most usual cause of postponement of the period of distribution is the direction, so frequently met with in family settlements, to retain the capital of chil-

Introductory.

(a) This point was noticed in *Beattie's Trs. v. Cooper's Trs.*, 24 D. 534. As to whether the expression of the implied condition *si sine liberis* has a suspensive operation in regard to the shares of legatees who have children born to them, see p. 352, *supra*.

(b) *Watson v. Marjoribanks*, 17 Feb. 1837, 15 S. 586; *Wood v. Wood*, 18 Jan. 1861, 23 D. 338; *Beattie's Trs. v. Cooper's Trs.*, *ut supra*.

(c) *M'Cormack v. Barber*, 25 Jan. 1861, 23 D. 398.

(d) 4 Mar. 1854, 16 D. 780.

dren's provisions until the attainment of majority, either by the individual legatee or the whole family. The chief difficulty in this class of cases consists in ascertaining whether the testator intended to postpone the period of division to an uncertain period, contingent upon the arrival of the children at majority, separately or collectively; or whether, on the other hand, he meant to create an absolute vested interest emerging on his death, qualified only by provisions for securing the fund, and protecting it against the results of accident or improvidence during the period of nonage.

Various forms of postponement having reference to status of Legatee.

Among the innumerable cases which have arisen upon the construction of settlements regulating the rights of children during minority, there are many which, though involving specialties in the character of the interest given, do not materially affect the vesting of the provisions. Thus it is a frequent condition in testamentary settlements, that the shares of daughters shall be payable at marriage or majority, whichever shall first happen; as in *Wellwood's Trs. v. Boswell* (a), where the settlement of an estate was made contingent on the marriage of a daughter with consent of trustees.

Conventional majority.

In other cases, the testator names a period of life different from that of legal majority, as the term at which payment shall be made, and which has sometimes been termed conventional majority (b); as in the cases of *Blackwood v. Dykes* (c), where trustees were directed to hold heritable property for behoof of the testator's son until he should arrive at the age of 25 years, when they were to convey the property to him; and *Reid v. Coates* (d), where a residue was made payable to the heir on his attaining the age of 27. In other cases the period of division has been fixed with reference to the age of one of the children of the family; as, for example, on the youngest child attaining majority (e), or the age of 18 (f), or the age of 36 (g). It is scarcely necessary to remark, that the substitution of a conven-

Such variances do not affect vesting.

(a) *Wellwood's Trs. v. Boswell*, 21 June 1851, 13 D. 1211.

(b) *Adam v. Adam's Trs.*, 30 Mar. 1861, 23 D. 859; see 862.

(c) *Blackwood v. Dykes*, 26 Feb. 1833, 11 S. 443; *Adam v. Adam*, *supra*, where majority was conventionally fixed at the age of 25.

(d) *Reid v. Coates*, 10 Mar. 1809, F. C. See also *Bell v. Mason*, 1749,

M. 6332; and *Burnett v. Forbes*, 1783, M. 8105, where the age of majority was anticipated.

(e) *Scheniman v. Wilson*, 25 June 1828, 6 S. 1019.

(f) *Clark v. Paterson*, 5 Dec. 1851, 14 D. 141.

(g) *Brown v. Campbell*, 16 Mar. 1855, 17 D. 759.

tional term in place of the legal age of majority is of no importance as an element in the determination of questions as to suspension.

There is another element which may generally be disregarded wherever minority is the occasion of postponement. We refer to the circumstance of a liferent being interposed, and thereby causing a further postponement of the period of division. The observations which have already been made regarding the effect of postponement to a time certain, relieve us from the necessity of proving that a clause merely postponing payment during the currency of a life interest, unaccompanied by a limitation to survivors or other contingent destination, does not *per se* suspend the vesting of the beneficial interest. Accordingly, if the period appointed for payment is dependent both upon the expiry of a liferent and the attainment of majority, and if there is such contingency in the destination as will necessitate a suspension of vesting during minority only, the succession will vest at majority. The expiry of the liferent during the minority of the fiar will not accelerate the vesting of the succession, nor will the continuance of the liferent after the beneficiaries are major prevent the acquisition of a vested interest (a). If, however, the contingent destinations are intended to cover the event of a failure, either during minority or during the subsistence of the liferent, the vesting will necessarily be deferred until the exhaustion of both the periods of contingency. In a systematic exposition of the law, it is more conducive to clearness to consider each ground of postponement separately. But in practice it will be found that, as the presumption for the suspension of vesting is much stronger in the case of a condition by which payment is made contingent on the attainment of majority, than in the case of a mere suspension for the benefit of a liferenter, the construction of the provision with reference to vesting is virtually determined by the former element.

How far necessary to take into view the circumstance of the existence of an interjected liferent.

It was at one time maintained that the maxim of the civil law, *dies incertus pro conditione habetur*, applicable in its original acceptance to matters of contract, ought to be applied inflexibly to the interpretation of clauses postponing payment in deeds of settlement. A rigorous extension of the maxim would doubtless have relieved the Court from all difficulty in dealing with the class of cases under consideration. Rights emerging at majority or marriage being

The Legatee's majority, although an uncertain event, is not conclusive as to the question of intention to suspend.

(a) *Matthew v. Scott*, 21 Feb. 1844, 6 D. 722.

affected with a radical uncertainty as to whether the beneficiary shall ever attain the status upon which payment is made dependent, it would follow, if effect were given to the maxim, that in every family settlement making provision for the care of the property of minors, the period of vesting must be coincident with the period of division. It will be seen that this is, in fact, the rule of construction applied to general and special legacies, as well as specific provisions of heritable property. But in the case of destinations of residue it was seen that the strict application of the maxim would lead to injustice; because, unless the settlement provided in express terms for the contingency of failure during the period of minority, the effect was, that the residuary interest would in that event fall as a lapsed succession to the next of kin, instead of devolving, as the settlor probably intended, upon the heirs of the residuary legatee or his surviving co-legatees. Naturally, therefore, the leaning of the Court has been in favour of the principle of vesting *a morte testatoris*. It has accordingly been laid down, without derogating from the authority due to the rule as to *dies incertus*, as presumptive of postponed vesting, that slight evidence of a contrary intention on the part of the testator shall suffice to overcome the presumption, and fix the period of vesting as at his death.

In the further elucidation of the subject, it will be convenient to classify the cases with reference to the character of the interests, the postponement of which is in question.

I. *Postponed Residuary Interest, either (1) without a contingent Destination, or (2) with a Destination over or Clause of Survivorship.*

It is *questio voluntatis* whether a residuary interest payable at majority vests, assuming that there is no subsequent destination.

1. In the decided cases falling under the first division of this section, the element of intention does not appear to have been much regarded. *Torrie v. The King's Remembrancer* (a) is a leading authority. The testator had appointed the residue of his heritable and moveable estate to be paid over to his two natural children, "equally betwixt them, share and share alike, and their heirs and assignees," the provisions being declared "not to be payable until they shall respectively attain the age of majority or be married." Both children survived; one died a minor. No provision was made for the application of the accruing interest. This fact, coupled

(a) *Torrie v. The King's Remembrancer*, 31 May 1832, 10 S. 597.

with the conditional institution of heirs and assignees (a), was supposed to be so manifestly suspensive of vesting, that the point was conceded, and the argument for the surviving residuary legatee rested on the doctrine of the *jus accrescendi* in joint destinations. But the Court were clear that this was not a joint destination, and that no interest vested in the deceased residuary legatee by his surviving the testator. They accordingly preferred the testator's next of kin to the lapsed residue. However, in *Clark's Exrs. v. Paterson* (b), a destination to "heirs and assignees" of the residuary legatees was held rather to afford an indication of intention that the shares should vest immediately. Here the trustees were directed to "pay or apply" the residue amongst the children *nominatim* and *nascituri*, "their heirs and assignees, share and share alike," when the youngest child had attained the age of 18; and this direction was followed by a clause of survivorship, to be operative in the event of any of the children "dying intestate, and without heirs of their bodies, before receiving payment." One of the daughters having died before the period of payment, after surviving the testator, the Court held that her share had vested in her husband, as legal assignee, under the destination to heirs and assignees. "I apprehend," said Lord Fullerton, "that when a legacy is so granted that the legatee has the power of testing upon it, or assigning it, to all intents and purposes that legacy vests, unless there is the strongest evidence of an intention that it shall not vest. All that we have here is a postponed term of payment, coupled with these considerations—that there is a power of assigning and a power of testing (c)."

Destination to Heirs and Assignees of the Legatee implies that the legacy is to vest immediately.

Where there are elements of true contingency in the destination, in addition to the postponement of payment, the vesting will be suspended during the subsistence of the contingent interest. This principle is illustrated by a recent case, in which trustees were directed to divide the succession on the youngest daughter attaining majority, subject to a proviso, that if any of the children succeeded to property exceeding by L.3000 the value of his share, such share

Effect of conditions.

(a) This was clearly a mistake. A destination to the legatee's heirs has no suspensive efficacy. *Supra*, p. 350.

(b) *Clark's Exrs. v. Paterson*, 5 Dec. 1851, 14 D. 141. See also *Hamilton v. Dougall*, 12 Feb. 1841, 3 D. 548, where

the direction was to hold *for behoof*; and cases cited *infra*, p. 374-5.

(c) 14 D. 145; see also *Queen's Remembrancer v. Dougall*, 12 Feb. 1841, 3 D. 548.

should be divided amongst the survivors. The Court ruled that the shares could not vest *a morte testatoris*, except subject to the condition of forfeiture in the event of the beneficiary succeeding to other property (a).

Suspension of vesting in consequence of the creation of subsequent interests.

Cases on Survivorship clauses and Destinations over.

2. That a destination over, either to the surviving legatees or to a third party, is suspensive of vesting, is a proposition so firmly fixed in our practice, that it becomes unnecessary in this place to enter upon a review of the cases in which it has been recognised; more especially since, in the case of payment being at the same time postponed to majority (where the concurrence of two separate elements of contingency was involved), it would be quite hopeless to struggle against the application of the rule. It may be sufficient to mention that, in the following instances of a residuary destination to children in shares payable at majority, with a destination over, the vesting was held to be suspended till the period of payment;—viz., in *Stewart's Trs. v. Stewart* (b), where there was a contingent destination to the settlor's brother in the event of there being no children surviving the period of payment; in the case of *Blackwood v. Dykes* (c), where the trust was for conveyance to a second son at the age of 25, with remainder, in the event of his death before attaining actual possession of the estates, to his issue, whom failing, to the testator's heirs and assignees whatsoever; and in *Wright v. Ogilvie* (d), where there was a contingent destination, in the event of failure of children to a widow, in alimentary liferent, with remainder to the testator's assignees, and a destination over. The same rule was applied, in the case of *Ogilvie v. Cuming* (e), to a destination of the residue of heritable and moveable estate, with this variation, that the institute having died *after majority*, but before receiving possession of the estates, the Court preferred the next heir-substitute to the institute's legal representatives, on the ground that the words of the destination imported a proper substitution. In the following cases, the residue was given to a plurality of persons, with the benefit of survivorship; and the vesting was in every instance held

(a) *Cunningham v. Cunningham*, 6 July 1858, 20 D. 1214.

(b) *Stewart's Trs. v. Stewart*, 17 July 1851, 13 D. 1387.

(c) *Blackwood v. Dykes*, 26 Feb. 1833, 11 S. 443.

(d) *Wright v. Ogilvie*, 9 July 1840, 2 D. 1357.

(e) *Ogilvie v. Cuming*, 27 Jan. 1852, 14 D. 363. See also *Campbell v. Campbell*, 3 Dec. 1852, 15 D. 173; *Croom's Trs. v. Adams*, 30 Nov. 1859, 22 D. 45.

to be postponed till the period of payment, from the necessity of preserving the contingent interest of the survivors unimpaired ;—viz., in *Greig v. Johnston* (a), and in *Campbell v. Reid* (b), where, however, the yearly interest for each term was held to belong to the children surviving such term, as it accrued ; and finally, in the case of *Walker v. Park* (c), where a clause of survivorship was found to have the effect of suspending the vesting, notwithstanding the direction to employ the annual proceeds of the estate in the maintenance and education of the beneficiaries.

However, it was laid down in two recent cases, that a general destination to the testator's children, payable to the survivors at a period fixed with reference to the majority of the children, vests in them as a class from the time of the testator's death. Although, therefore, the interests of the individual children cannot be said to vest *a morte*, on account of the uncertainty as to the extent of the interest, yet if that uncertainty should be removed by the death of all the children *except one*, before the period of division, there is no longer any obstacle to prevent the complete vesting of the succession in the last survivor. This is the import of the cases of *Cattanach v. Thom's Exrs.* (d), where the succession was given to the only child and heir of the last survivor, who had died in minority ; and *Maitland's Trs. v. M'Dermid* (e), where the residue was given to the testamentary heir of the last survivor, dying in minority, in preference to the truster's next of kin. The Lord J.-C. Inglis observed, "It is beyond all doubt that the beneficial interest in the truster's estate was vested in his children as a class ; though, by the provisions of other clauses, that vesting may be postponed as regards some of the children, and as regards others it may suffer defeasance (f).

Where right has vested in a family, subject to condition of survivorship, the last survivor takes an immediate vested right.

II. *Postponed Legacies of Quantity and Special Provisions.*

In this class of cases, the conflict between theory and intention, which was maintained for a long period with varying success, has been productive of great uncertainty in the administration of the

Summary of the results of the decisions on this branch.

(a) *Greig v. Johnston*, 1 July 1833, 6 W. & S. 406, affirming 9 S. 806.

(b) *Campbell v. Reid*, 12 June 1840, 2 D. 1084.

(c) *Walker v. Park*, 20 Jan. 1859, 21 D. 286.

(d) *Cattanach v. Thom's Exrs.*, 2 July 1858, 20 D. 1206 (First point).

(e) *Maitland's Trs. v. M'Dermid*, 15 Mar. 1861, 23 D. 732 ; see p. 384, *infra*.

(f) 23 D. 736.

law. The presumption against a lapse is certainly weaker in the case of a legacy than in the case of a residuary share; for, while a lapsed residuary legacy falls into the residue, a lapsed residuary share necessarily passes to the next of kin as intestacy,—a result which can scarcely be supposed to have been within the contemplation of the testator. Without pretending to reconcile all the authorities, we believe the import of the decisions on the vesting of postponed legacies may be fairly represented in the following propositions, premising that we deal at present only with postponement till marriage or majority; the subject of postponement with a view to the security of life interests having already been the subject of discussion in a previous section:—(1.) A declaration that legacies are to bear *interest*, or that interest is to be exigible or payable during minority, is held to raise a presumption that the testator intended the provision to vest *a morte*, though such intention be not expressly declared. A direction to hold for behoof of children in minority, seems to be equivalent in effect to a direction to pay interest, especially if the fund is made chargeable with their maintenance. (2.) A destination to heirs and assignees of the institute also implies vesting *a morte testatoris*. (3.) Where a legacy is given jointly, or in shares, to *all* the children of a family, payable at majority or marriage, the provisions vest at majority, and are payable when, from the death of the parent, or other circumstances, the number of the beneficiaries entitled to succeed is finally ascertained; and, on principle, it may be laid down, that the conditional institution of the surviving children would also be suspensive of vesting until the period of payment. (4.) It would seem that a legacy given to a party simply, without substitution or other qualification, payable at majority, does not vest till payment, as in this case there is no indication of intention to exclude the application of the rule that contingent interests do not vest.

Effect of declaration that the legacy shall bear interest.

1. Notwithstanding the recognition of the rule, that “majority” and “marriage” are conditions suspensive of vesting, in the cases of *Sempill* (a) and *Home* (b), where the distinction between simple

(a) *Sempill v. Sempill*, 1792, M. 8108, decided that a power of anticipating the period of payment was no proof of an intention to give a vested interest.

(b) *Home v. Home*, 28 Jan. 1807, Hume, 530; overruling *Burnett v. Forbes*, 1783, M. 8105. These early cases are of no authority, and it is needless to comment upon them.

postponement and contingency was, for the first time, clearly established,—the intention of the testator was very soon after brought in as a disturbing element. Thus, in *Wood v. Burnett's Trs.* (a), where legacies of L.1000 each were bequeathed to the children of a stranger, *the produce thereof to be accounted for yearly*, and the principal sum transferred to each legatee as soon as he arrived at the age of majority; and the children all died minor,—the Court held, that the beneficial interest had vested *a morte testatoris*, so as to be transmissible to their representatives. The principle here laid down, that a direction to pay interest from the testator's death implies a vested right in the capital, is supported by several decisions (b); and it has been decided, where there was a destination to survivors, that the vesting was not postponed beyond the period when interest was payable. In *Kennedy v. Crawford* (c), the testator directed his trustees to make payment to the younger children of his son, Peter Crawford, of the sum of L.2000 “equally amongst them, with the lawful interest thereof, from the first term of Whitsunday or Martinmas after the said Peter Crawford's death, should that happen before the children should arrive to majority; my said trustees employing the interest of that sum from the time of my death, for the maintenance, clothing, and education of the said younger children during their respective pupillarities and majorities;” and to divide the capital, as soon as the youngest arrived at majority, amongst the *surviving* children. The Court were much divided in opinion, as to whether the legacies vested at the death of the testator; but it was finally determined by a majority, that the shares had vested, and were arrestable before the period of payment; the Lord Pr. Boyle observing, that when a sum was appointed to be paid with lawful interest from the testator's death, that implied that the sum itself was to be paid as well as the interest; and that as to the direction to apply the interest in the maintenance of the children, and to pay up the capital when the youngest child should attain majority, *that* went only to the management, and not to the question of vesting (d). So also in the case

(a) *Wood v. Burnett's Trs.*, 2 July 1813, Hume, 271.

(b) *Matthew v. Scott*, 21 Feb. 1844, 6 D. 718; *Kennedy v. Crawford*, and *Ralston v. Ralston*, *infra*.

(c) *Kennedy v. Crawford*, 20 July 1841, 3 D. 1266.

(d) 3 D. 1270.

of *Ralston v. Ralston*, where a legacy was made payable to one child, whom failing, to two others, or to the *survivor*, "with the interest thereof from six months after my death, payable the said interest to their legal guardians for their behoof," the principal being payable at the period of majority,—the Second Division held unanimously, that the right to the legacy vested in the institute on his survivance of the testator (a).

Whether direction to hold for behoof of minor children is equivalent to a direction to pay interest.

In *Hamilton v. Dougall* (b), the trustees were directed to hold the residue of moveable estate *for behoof of the truster's natural daughter during her minority*, subject to the payment of an annuity; and the trustees were further directed to avail themselves of any favourable opportunity for investing the funds on heritable security, *for behoof of his daughter and the heirs of her body*; whom failing, to his own lawful heirs. The daughter having died in minority, without issue, the estate was claimed by the Crown, who maintained, on the authority of the cases of *Wood v. Burnett's Trs.* (c), and *Hardman v. Guthrie* (d), that a *jus crediti* vested in the daughter, and was transmitted to the Crown as *ultima hæres*. The judges appear to have leant to the opinion that there was a vested interest in Miss Dougall, but found it unnecessary to decide the point; being of opinion that the destination implied a *substitution*, which would carry the estate to the truster's heir-at-law upon the death of the daughter without issue.

Destination to "Heirs and Assignees" implies an intention to give an immediate vested interest.

2. With regard to the effect of a destination to heirs and assignees of the legatee, we may refer to our remarks on the case of *Clark v. Paterson* (e), in the previous part of this section. The import of the decision is, that a bequest of residue to one or more parties, and their "heirs and assignees," vests a *morte testatoris*. The case of *Bell v. Cheape* (f), in which the construction of those important words was settled by a decision of the whole Court, is quite consistent with *Clark v. Paterson*; for the Court decided only that the

(a) *Ralston v. Ralston*, 8 July 1842, 4 D. 1496. See also *Wilson v. Wilson*, 9 July 1842, 4 D. 1503,—a somewhat special case.

(b) *Hamilton v. Dougall*, 12 Feb. 1841, 3 D. 548.

(c) *Wood v. Burnett's Trs.*, Hume, 271.

(d) *Hardman v. Guthrie*, 6 June 1828, 6 S. 920.

(e) *Clark v. Paterson*, 5 Dec. 1851, 14 D. 141.

(f) *Bell v. Cheape*, 21 May 1845, 7 D. 614.

legacy was not assignable *until* it vested ; and in this case the legacy could not vest *a morte testatoris*, being expressly made contingent upon the failure of a liferentrix without issue her surviving. There does not seem, therefore, to be any good reason for doubting that a bequest to a legatee, his heirs and executors, becomes immediately assignable on the legatee's survivance, notwithstanding the postponement of payment till majority.

3. We proceed to notice the case of a joint legacy bequeathed to children of a family, and payable at majority or marriage, with reference to the question, whether the intention is to benefit the children alive at the death of the testator only, or to continue the trust so as to include those who may be afterwards born. On this point the cases of *Scheniman* and *Biggar's Trustee* may be compared. In *Scheniman's* case a liferent was given to the mother, the fee being payable to the children after the youngest had attained majority ; and the structure of the settlement clearly evinced an intention to include all the children of the liferentrix. However, when the case came into Court, Mrs Scheniman consented to the capital being paid over to the children then in existence ; and as she was then 48 years of age, and her youngest child was 26, the judges thought there could be no reasonable objection to an anticipation of the period of vesting, and appointed the trustees to denude, on security being found for payment of the life interest, and also for the eventual interest of any other grandchildren of the testator that might be born (a). The case of *Biggar's Trustee v. Biggar* (b) was materially different. The testator, by his codicil, gave the whole residue of his estate to his wife in fee, with a conditional institution in favour of the children of his son John Biggar, and the survivor of them ; whom failing, to John Biggar himself. The testator survived his wife ; and the question was, whether the succession opened to the grandchildren surviving the testator. Here there was no provision for a continuing trust, or for the accumulation of interest ; and no postponement of the period of payment until the majority of the children. In view of these circumstances, the First Division were of opinion that the intention was to benefit the children surviving the longest liver of the spouses. The fact

Bequest to children of a family, payable at majority or marriage.

(a) *Scheniman v. Wilson*, 25 June 1828, 6 S. 1019. See p. 363, *supra*. (b) *Biggar's Tr. v. Biggar*, 17 Nov. 1858, 21 D. 4.

that the postponement of vesting would exclude the possibility of the testator's son succeeding under the ulterior destination, was also taken into view as an element in the determination of the testator's intention. As the majority of the Court were satisfied that the period of distribution had already arrived, it was of course unnecessary in that view to exact security for the interest of future children. On this point, however, Lord Deas took a different view, holding that, although the surviving grandchildren were entitled to be put into possession of the fee, their shares were subject to abatement, in the event of new interests emerging by the birth of other children in the family (a).

Effect of subsequent destinations.

With regard to the import of a clause of survivorship or destination over in a legacy, the payment of which is postponed until majority or marriage, the effect will be the same as in the case of residuary shares. As a general rule, such contingent destinations necessitate a postponement of vesting until the period of payment (b). Such clauses, therefore, aid the general presumption for postponement of vesting until the arrival of the legatee at majority; but it is doubtful whether they can be held sufficient to control the counter presumption for immediate vesting when the legacy is made to bear interest (c).

Where there is no evidence of a contrary intention, a legacy payable at majority, etc., does not vest until that period.

4. The principle has been clearly established by several of the early cases, that provisions, the payment of which, whether with or without interest, is deferred till majority or marriage, do not vest in the meantime (d). We have already considered various exceptions which have been introduced by the refinements of modern construction; and, as the truth of the rule has not been questioned as an abstract proposition, however much its authority has been controlled by the doctrine of presumed intention (e), it will not be necessary to refer more particularly to the subject.

(a) See also *Lord v. Colvin*, 23 D. 114, "Case."

(b) *Croom's Trs. v. Adams*, 30 Nov. 1859, 22 D. 45; *Campbell v. Campbell*, 3 Dec. 1852, 15 D. 175, and cases cited *supra*, p. 370.

(c) See the cases of *Ralston v. Ralston*, and *Kennedy v. Crawford*, 4 D. 1266, 4 D. 1496; *Wilson v. Wilson*, 4 D. 1503;

(d) *Bell v. Mason*, 1749, M. 6332;

Omey v. M'Larty, 1788, M. 6340; *Sempill v. Sempill*, 1792, M. 8108; *Home v. Home*, 28 Jan. 1807, Hume, 530; *Grindlay v. Merchants' Maiden Hosp.*, 1 July 1814, F. C.; *Arbuthnott v. Arbuthnott*, 7 June 1816, Hume, 536; and *Torrie v. King's Remembrancer*, 31 May 1832, 10 S. 597.

(e) *Forbes v. Luckie*, 26 Jan. 1838, 16 S. 374, and cases cited *antea*, pp. 372-5.

With regard to the accumulated proceeds of the succession during the period of postponement, these will either go with capital, or fall into the undisposed-of residue, and will necessarily vest at the same period as the fund to which such accumulations may be found to belong by way of accession (a).

Vesting of accumulations of interest.

(a) See Chapter XXXVI. Section 3.

CHAPTER XLV.

OF THE ACCELERATION OF THE PERIOD OF DISTRIBUTION.

How questions
as to anticipa-
tion arise.

IT is a very obvious remark, and one which might be illustrated by a reference to almost any of the questions which have been discussed in the preceding chapter, that a vested interest in a succession may be acquired before the period at which the settlor intended that his estate should be divided and paid over. For the purposes of the present subject of discussion, it is important to mark a distinction between the nature of the circumstances which necessitate the postponement of the period of vesting, and those which operate merely in the manner of postponing the period of possession or distribution of a fund, the destination of which is certain, and which is therefore regarded as a vested interest. The possibility of future, contingent and emerging interests is, if not always, at least in the majority of cases, the cause which prevents the acquisition of a vested right; the existence of prior and limited interests in the trust estate is, in the greater number of cases which occur in practice, the operative cause of postponement in the period of distribution. Accordingly, in settlements which are correctly drawn, the final distribution is appointed to be made at the expiration or determination of the life interests or other temporary provisions which are carved out of the general estate. It may happen, however, that those interests are defeated or fail at an earlier period than was anticipated by the settlor; and the question then arises, whether the beneficiaries to whom the ultimate interest is given are entitled to an immediate conveyance of the estate.

Anticipation of
payment com-
petent after
Legatee has
acquired a
vested interest;

The decisions of the Court of Session in reference to this question justify us in laying down, as a general proposition, that unless it appears upon the face of the settlement that the testator

had some other object in view in directing a postponement of the period of distribution, than that of securing the prior interests which we assume to have failed,—the failure of those interests entitles the beneficiaries of the residue to an immediate division, although, on a strict construction of the settlement, the period of division is postponed to a later date. For, if there be no beneficiary *in titulo* to claim the intermediate profits; and if there be no direction, express or implied, to accumulate such profits for a definite period, they must either fall into residue, or result to the heir-at-law. The presumption is strong against the latter supposition; and as to the former, it obviously involves the recognition of the residuary legatees' title to require immediate payment, on the ground that they have the right both of the fee and the usufruct.

Where, on the other hand, the vesting of the ultimate interest remains in suspense by virtue of the form of the destination until the time at which the final distribution of the estate is appointed to take place, the failure of prior interests will not justify the trustees in anticipating the period of distribution.

but not where it would have the effect of defeating contingent interests.

Parties in whose favour contingent interests have been limited, have a clear right to have the trust kept up until the elapse of the appointed period of division. The residuary legatees first named may die before the period of distribution specified in the settlement; in which case the conditional institutes, or the survivor of those first instituted—if the destination be to survivors—acquire an absolute right to the succession, a right which the trustees are not entitled to disappoint by a premature conveyance to the institutes. In this class of cases, accordingly, the interest or profits of the estate must be accumulated and added to the capital; and even although the result should be that the final distribution of the estate is postponed for more than twenty-one years after the settlor's death, still, so long as the destination of the residuary interest remains uncertain, no benefit can accrue to the presumptive legatees; but the surplus revenues must be treated as undisposed-of succession, and paid to the settlor's heirs-at-law (a).

As all questions relating to the acceleration or anticipation of the period of division may be solved by the application of the simple principle which we have attempted to explain, it is unnecessary to

Importance of the element of vesting in regard to such questions.

(a) *Lord v. Colvin*, 7 Dec. 1860, 23 D. 111.

enter upon a detailed examination of precedents. It may, however, be convenient to classify the decisions according to the circumstances by which the prior interests are determined. When so considered, it will be seen that the competency of anticipating the period of division is resolved by the criterion of vesting, and is entirely independent of any specialties connected with the cause of failure. Wherever the entire estate has passed into the persons of legatees in whom a right has vested, they are entitled to immediate payment; where, under the terms of the settlement, the interest has not vested, anticipation is incompetent.

Classification of cases in which payment may be required, in anticipation of the appointed period.

A legatee may become entitled to the enjoyment of a succession in anticipation of the period appointed by the settlement,—*First*, where, by the terms of the settlement, he is entitled to a reversionary fee upon the death of a liferenter, and he acquires right to the liferent by direct conveyance or by merger, that is, where the liferent is discharged: *Secondly*, where the legatee has a liferent by the terms of the settlement, and acquires the fee as heir-at-law, conditional institute, or purchaser: *Third*, where, by the terms of the settlement, legatees *in esse* have a vested right to a fund, subject to diminution in the event of the birth of children in a certain family, and from the age of the mother, or other circumstances, it is to be presumed that the number of the family will not be increased: *Fourth*, where a legatee's interest is dependent upon the death of another person, and the circumstances are such as to overcome the presumption of life, although the death of the party previously instituted is not actually proved: *Fifth*, where the parties respectively entitled to the fee and life interest, concur in desiring the trustees to denude. *Lastly*, we shall consider the case where the distribution is postponed to a definite time, subject to a destination over, and the parties conditionally instituted have all failed, or where under a joint destination the interest has vested in the last surviving legatee.

Case of a heir acquiring the liferent, or claiming the benefit of a discharge of that interest.

1. Among the leading cases upon acceleration in consequence of the discharge of a life interest, we may notice, first, the case of *Rainsford v. Maxwell* (a), where trustees were directed to pay the annual proceeds of a trust estate to the testator's nephew during

(a) *Rainsford v. Maxwell*, 6 Feb. 1852, 14 D. 450. See also *son v. Paterson*, 26 Jan. 1849, 11 D. 441.

his life, or until he should succeed to a certain entailed estate, and on his death or succession, to make over the whole to the testator's niece. The nephew offered to concur with his sister, the fiar, in granting a discharge to the trustees; and in these circumstances the Court held that the trustees were bound to denude.

The case of *Pretty v. Newbigging* (a) was attended with greater difficulty. In this case, the testator's widow, who had a liferent of the estate, offered to renounce her interest in favour of her son, to whom a fee was given, with a destination over in favour of his children. The case was referred to the whole Court, who, by a majority, sustained the claim of the son to immediate payment. The grounds of the decision were various; but the principle upon which the judgment may best be supported is, that as the destination over to the legatee's children was nothing more than what the law would have implied—under the condition *si sine liberis decesserit*—the destination was presumably to be referred to the same period as that to which the implied condition is held to refer, namely, the death of the testator; and the interest was therefore vested. In *Foulis v. Foulis* (b), there was a life interest limited to the widow, fee to her three sons with right of survivorship, and to their issue. Had the survivorship clause remained operative, the vesting of the fee must of course have remained in suspense; but as this right was evacuated by the death of two of the widow's three children, the circumstances of the case were narrowed to the same position as *Pretty v. Newbigging*; there being no contingent interest remaining except that of the surviving son's children *nascituri*. The fee was thus held to have vested in the surviving son, to whom accordingly the trustees were decerned to convey the estate upon the widow executing a renunciation of her liferent.

On the other hand, in the previous case of *Ferrie v. Ferrie* (c), where also the residue of the truster's estate was limited to a party and his lawful issue, subject to an annuity to the testator's widow, and the period of distribution was fixed at the death of the widow, the Court refused to allow the period of division to be anticipated

Whether the contingent interest of the Legatee's children is sufficient to prevent anticipation.

Where the interest of the Legatee's children has been considered by the Testator, when directing postponement, payment cannot be anticipated.

(a) *Pretty v. Newbigging*, 1 Mar. 1854, 16 D. 667. See the question of vesting in reference to this case discussed, *supra*, pp. 352–3.

(b) *Foulis v. Foulis*, 3 Feb. 1857, 19 D. 362.

(c) *Ferrie v. Ferrie*, 23 Feb. 1849, 11 D. 704.

although the residuary legatee offered to pay all legacies, and to secure the annuity to the satisfaction of the Court and of the trustees. In this case, the proposed anticipation was opposed by one of the residuary legatees' children, who desired to have the trust kept up for the protection of his contingent interest. As in this case the widow was not instituted to the liferent of the *entire* estate, it might fairly be presumed that, in postponing the period of division, the testator had also in view the contingent interest of the legatees' children,—a circumstance which distinguishes this case from those already mentioned.

Effect of a repudiation of the life interest upon the Fiar's rights.

Where a liferent interest limited by deed is rejected by the beneficiary, as in the case of a widow claiming her legal provisions in place of an annuity settled upon her (*a*), or where an annuity is held to be satisfied by advances (*b*), such renunciation is held to place the fund in the same situation as if the interest had lapsed by death; and therefore, if there are no contingent interests to be protected, the fiars are entitled to an immediate division.

Case of a Liferenter acquiring the fee.

2. It is unnecessary to refer in detail to the cases which establish the proposition, that a liferenter who succeeds to the fee of the same subject, in virtue of a radical right (*c*), of the terms of the trust destinations (*d*), or as heir-at-law (*e*), is entitled to demand a conveyance from the trustees. In conformity with this principle, it has been held, that where a fund is destined by a marriage-contract to the wife in liferent, and the children of the marriage in fee, whether with or without an ulterior destination to the wife herself and her heirs in fee—upon the death of the husband without issue, the wife becomes entitled to the fee absolutely, and may put an end to the trust (*f*). On the other hand, where a liferent was given to a wife for her alimentary use, and she afterwards succeeded to the fee as conditional institute under the ulterior destination, it was decided that the trust must be kept up during the subsist-

(*a*) *Annandale v. Macniven*, 9 June 1847, 9 D. 1201. See Chapters XL. and XLII., as to Satisfaction and Election.

(*b*) *Hume v. Stewart*, 26 Nov. 1834, 13 S. 90.

(*c*) *Martin v. Bannatyne*, *infra*.

(*d*) *Grant v. Dyer*, 8 Dec. 1813, 2 Dow, 73.

(*e*) *Nisbet v. Tod*, 15 Jan. 1848, 10

D. 361; *Maxwell v. Wylie*, 25 May 1837, 15 S. 1005.

(*f*) *Martin v. Bannatyne*, 8 Mar. 1861, 23 D. 705. Part of the fund in question came from the husband, and part from the wife's father, and the Court found the widow entitled to the whole sum.

ence of the marriage for the better protection of the wife's alimentary interest (a). But in such a case, there can be no doubt that if the widow survived, she would be entitled to payment of the capital.

3 & 4. The anticipation of the distribution of a trust estate, where the trust is only maintained for the protection of the interests of children *nascituri*, or for the interest of a party presumed but not proved to have died, has been already incidentally noticed in treating of the conditions of vesting; and it is unnecessary to recur to the subject (b). In such cases, the Court have a discretion to impose upon the legatees to whom payment is appointed to be made, the condition of finding caution to answer the claims that may arise, should the event disprove the supposition upon which the Court proceeded.

Cases depending on possibility of future issue, or upon presumption of life.

5. Our next proposition is, that where all the parties interested in the distribution of a trust estate, whether as beneficiaries or conditional institutes, concur in desiring the trustees to denude under such conditions as may be agreed upon, the trustees are bound to be satisfied with their discharge, and have no right to retain the estate. The most simple case is that of liferenters and fiars requiring the trustees to convey to them for their respective interests (c). Upon the authority of the cases relating to the sale of heritable property, it may be laid down that trustees would not be bound to denude of a heritable succession on the joint requisition of the beneficiaries, if any of those parties were in minority (d). The limitation of a period of conventional majority by settlement, does not deprive the bene-

Payment may be anticipated by consent of all the parties who have either a vested or a contingent interest.

(a) *Balderston v. Fulton*, 23 Jan. 1857, 19 D. 293.

(b) *Supra*, pp. 363, 375; and see Chapter XXVI. (II. 82.)

(c) See *Rutherford v. Turnbull*, 30 May 1821, 1 S. 38; *Craigie v. Gordon*, 17 June 1837, 15 S. 1157, where the fact that the liferenter was a widow, deaf and dumb, but *sui juris*, was held not to impose upon the trustees the duty of retaining the custody of the estate; *Robertson v. Davidson*, 24 Nov. 1846, 9 D. 152, where it was decided that the trustees were not bound by a direction to hold the estate during the liferent, when the liferenter and fiar concurred in demanding an immediate

conveyance. An example of a more complicated arrangement between beneficiaries, involving the admission to a share of the succession of one of a family who stood excluded under the settlement, will be found in the case of *Brown v. Campbell*, 16 Mar. 1855, 17 D. 759. See also *M'Lachlan's Exrs. v. Scott*, 16 Jan. 1850, 12 D. 467; *Johnston v. Johnston*, 11 Mar. 1857, 19 D. 707, and 3 M'Queen, 619, 631, where Lord Chancellor Campbell observed, that "a family settlement, when *bona fide* made, the law much favours."

(d) *Pet. Auld*, 5 Feb. 1856, 18 D. 487. But see *Hope*, 15 Jan. 1858, 20 D. 390.

ficiaries of their right to act in relation to the succession on attaining legal majority; and accordingly, in a recent case, where children's provisions were made payable on their attaining the age of 25, it was held that a transaction with the trustees, into which they had entered after the youngest had attained majority, could not be repudiated by the children (a).

Joint discharge by Beneficiaries to Trustees does not affect Beneficiaries' interests *inter se*.

It happens not unfrequently that funds are advanced by trustees to a family on the joint authority of all the legatees interested, without any distinct arrangement as to the mutual rights of the parties. If, in consequence of a transaction of this kind, a discharge is afterwards granted to the trustees by all the beneficiaries, this will not exclude the right of the individual beneficiary to an ultimate adjustment of accounts as between himself and the other members of the family, as the discharge in such a case is presumed to have been granted simply for the exoneration of the trustees (b). It is almost superfluous to add, that transactions between heirs are not binding in a question with an individual beneficiary who has not been a party to the arrangement (c).

Contingent interests.

The existence of contingent interests is, as we have already seen, an effectual bar to any arrangement amongst beneficiaries involving anticipation of the period of payment, unless the parties contingently interested concur in discharging the trustees (d).

Acceleration of period of vesting by predecease of Conditional Institutes or Co-legatees.

6. Where, under the terms of a settlement, the vesting of the reversionary interest is postponed to the period of distribution in consequence of a provision of survivorship, if all but one of the joint legatees die or renounce their interests prior to the period of distribution, the interest of the survivor vests absolutely; for, the contingent interest which was the cause of the suspension being removed, there is no longer any obstacle to the acquisition of a vested right (e). Accordingly, where the right to a joint bequest, subject

(a) *Adam v. Adam*, 30 Mar. 1861, 23 D. 859.

(b) *Halbert v. Dickson*, 13 Feb. 1851, 13 D. 667. See, as to questions of this nature between creditors, *M'Lachlan's Exrs. v. Scott*, 16 Jan. 1850, 12 D. 467.

(c) *Mitchell v. Macmichan*, 13 Jan. 1852, 14 D. 318.

(d) *Campbell v. Campbell*, 3 Dec. 1852, 15 D. 173. Compare *Scott v. Scott*, 18 June 1847, 9 D. 1264, 7 Bell, 143, with *Nisbet v. Macdougall*, 27 June 1809, F. C.

(e) *Foulis v. Foulis*, 3 Feb. 1857, 19 D. 362; *Maitland's Trs. v. M'Dermid*, 15 Mar. 1861, 23 D. 732. In *Cattanach v. Thom's Exrs.*, 2 July 1858, 20 D. 1206, the right to a joint bequest

to a liferent, has vested in the last survivor, the trustees are bound, on receiving a discharge of the liferent interest, to convey the entire estate to the surviving fiar (a). [*Foulis v. Foulis.*]

of residue was held to have vested in the issue of the last survivor before the arrival of the period of distribution, in virtue of the condition, *si sine liberis decesserit*. See also *Smith v. Leitch*, 2

June 1826, 4 S. 659; *Mowbray v. Scougall*, 9 July 1834, 12 S. 910; *Maxwell v. Wylie*, 25 May 1837, 15 S. 1005.

(a) *Foulis v. Foulis*, *supra*.

CHAPTER XLVI.

APPOINTMENT OF JUDICIAL FACTORS UPON TRUST ESTATES.

Origin of the power of appointment vested in the Court of Session.

Appointments, when made.

Appointment of Factors upon lapsed trusts.

IN order that the beneficial interest may not lapse in consequence of the failure of the trustees of settlements, the Court of Session has been in use to appoint judicial factors upon trust estates, in circumstances where such appointments were necessary, either for the protection of the ultimate interests of the beneficiaries, or with a view to immediate management. As such appointments are made *ex nobile officio*, the Court is not bound by any positive rules having relation to the convenience or expediency of interfering. There are, however, certain situations in which the appointment of a factor is a matter of obvious expediency, and where the appointment will be granted almost as a matter of course. The circumstances to which we refer are these:—*First*, where the office of trustee has lapsed, and the title to the beneficial or equitable interest still stands upon the trust conveyance; *secondly*, where the trustee is insolvent, or has so conducted himself in relation to the trust affairs or otherwise as to be deemed untrustworthy; *thirdly*, where a quorum of trustees cannot be obtained, as may happen in the event of the incapacity, illness, or non-residence of one or more of the original accepting trustees; *fourthly*, in the event of the trustees differing in opinion with reference to the general course of management, or to transactions of special importance.

1. The earliest examples of the interposition of the Court in matters of trust administration, were appointments in cases where there was a total failure of trustees. No doubt seems ever to have been entertained as to the jurisdiction and power of the Court to make such appointments; but in some cases it seems to have been contended that the beneficial interest was a mere burden upon

the estate of the trustee, and fell with it, as a necessary consequence of the failure in the trust destination (a). The argument, however, was not successful. The distinction between the legal and equitable estates under trust settlements was recognised by the judges of the last century, and the doctrine laid down, that a lapse of the one estate did not involve the destruction of the other. It was virtually settled by the decisions referred to, and by the case of *Campbell v. Campbell* (b), that unless the right of succession was made dependent upon the trusteeship, *e.g.*, in cases where a power of appointment was given to the trustee, the rights of the beneficiary could not be affected by his death or non-acceptance. This view was confirmed by two decisions which followed soon after (c), establishing a form of action, declaratory adjudication, whereby a beneficiary might obtain himself vest in the equitable interest notwithstanding the failure of the trustees of the settlement. The theory of the law in relation to equitable titles, as well as the course of practice, show that the appointment of judicial factors upon trust estates is properly an act of administrative jurisdiction. Such appointments are not necessary to complete or fortify the title to the equitable estate. Their purpose is that of supplying a vacancy in the office of trustee, and providing for the economical administration of the estate under the supervision of the Supreme Court (d).

It has been laid down, that where the trust deed makes provision for the assumption or nomination of trustees, the Court will not interfere, unless it can be shown that those provisions are inapplicable to the emergency which has arisen (e). As trustees are now, in virtue of the enabling clauses of the Trustee Act (f), 1861, empowered to resign at pleasure, and also to supply vacancies in the trust by the assumption of new trustees, it might be supposed

Court will not interfere where there is a subsisting power of assumption.

(a) See *Dick v. Ferguson*, 1758, M. 7446; *King's College v. Ogilvie*, 1741, Elchies, "Trust," No. 11, Notes voce "Jurisdiction," No. 21; *Marischal College v. Ramsay*, 1741, Elchies, "Jurisdiction," No. 21; *Campbell v. Monzie*, 1752, M. 7440; *Macdowall v. Macdowall*, 1789, M. 7453.

(b) *Campbell v. Campbell*, 1738, M. 4076, 6849.

(c) *Drummond v. Mackenzie*, 1758,

M. 16206; *Dalziel v. Dalziel*, 1756, M. 16204.

(d) Accordingly, the Court will not confer special powers upon the factor at his appointment, even though the destination should be to a factor to be nominated by the Court, on failure of the original trustee (*Harper*, 7 Feb. 1833, 11 S. 365).

(e) See *Hamilton v. Littlejohn*, 7 W. & S. 380, and N. S. 217.

(f) 24 & 25 Vict, cap. 84.

that in future there would be little need for requiring the assistance of the Court for that purpose. But the fact is, that by far the larger number of applications are those which occur in consequence of the total failure of the trustees, when there is, of course, no person *in titulo* to exercise powers of assumption.

Double trusts.

Where a widow, who had accepted and acted as trustee on her husband's estate, died intestate, and a judicial factor was appointed to administer her estate, the Court appointed the same party factor on the trust estate of the husband, being of opinion that there was no necessity for a double management (a).

Examples of appointments in consequence of a lapse in the administration of testamentary trusts.

As the beneficiary's right to have a factor appointed results from the fact that the trust appointment has lapsed, it is clear that in a question as to the competency or propriety of the proposed appointment, the manner in which the lapse has resulted is of no materiality. We shall merely mention some of the more ordinary varieties of circumstance under which such applications have been granted. For example, the office of trustee may lapse where all the parties named have predeceased the testator (b), or where those who survive either fail to accept the trust (c) or refuse to exercise their office (d). Again, it may happen that, although a quorum of the trustees have actually accepted, the trust may be prematurely brought to an end, either by the death of all the trustees, without any new appointment having been made (e), or by the exercise of a power of resignation (f),—though it may be doubted whether trustees can relieve themselves from responsibility by resigning, without having previously made provision for the continuance of the trust by the assumption of successors (g). In the class of cases we have referred to, the appointment of a factor is usually made as

(a) *Clark v. Barstow*, 17 June 1856, 18 D. 1041. But see *Halcomb*, 9 July 1853, 15 D. 861.

(b) *Cairns*, 19 Jan. 1838, 16 S. 335.

(c) *Smart*, 29 June 1854, 16 D. 1004.

(d) *Drummond v. Lindsay*, 13 June 1857, 19 D. 859; *Russell*, 27 June 1855, 17 D. 1005.

(e) See *Thomson*, 10 July 1857, 19 D. 964; *British Linen Co.*, 20 July

1844, 16 Jur. 603; *Douglas*, 14 Dec. 1839, 2 D. 238. As to the effect of a partial failure in appointments of trustees for charitable uses, see *Wylie*, 28 June 1850, 12 D. 1110; *Ferguson v. Marjoribanks*, 1 Apr. 1853, 15 D. 637.

(f) *Broughton's case*, cited *MacKenzie v. Grieve*, 20 Dec. 1828, 7 S. 223.

(g) Per Lord Brougham in *Miller v. Black's Trs.*, 2 S. and M'L. 890.

a matter of course. It has sometimes been pleaded as a defence to applications under such circumstances, that the trust purposes have been fulfilled. This is a good defence, if well founded in fact; for, clearly, the Court would not commit the solecism of appointing a factor on an estate which had ceased to exist (*a*). But if there is any estate, and any person claiming an interest in it, although merely reversionary and prospective (*b*), or subsidiary, *e.g.*, as in the case of a creditor seeking to secure his debt (*c*), a factor will, as a rule, be appointed. A party who has been nominated trustee, and who declines, will not be appointed judicial factor on the estate (*d*).

Defence that estate exhausted and trust wound up.

The limits within which the Court will exercise the power of appointing judicial factors upon estates created by trusts *inter vivos*, are not very well defined. On the one hand, the Court considers itself bound by the maxim that its powers are only to be exercised in case of necessity,—that is, where there is no legal custodian of the trust property, and no power of reappointment vested in the parties interested. In what circumstances a power of reappointment may be given by implication has never been definitely settled. It has generally been considered, that as regards private trusts for behoof of creditors, no power of appointment remains in the truster unless expressly reserved to him, and that the creditors have not the power of electing a new trustee unless it is conferred upon them by express grant. In such cases, accordingly, the authority of the Court may be sought with a view to the appointment or election of a new trustee (*e*). Still, as the radical title to property disposed in trust for behoof of creditors belongs unquestionably to the truster, we incline to think that a power of appointing a new trustee to supply a vacancy must be held to remain with him as an adjunct to the property title. It is settled that a truster may at

Trusts *inter vivos*. Whether Truster has a reserved power of appointment.

Trusts for Creditors.

(*a*) The Court is chary of appointing a factor where the apparent object of the application is to gain an advantage over a competing claimant (*Cunninghame*, 15 Jan. 1839, 1 D. 362; *Marshall*, 5 Jan. 1859, 21 D. 203).

(*b*) *Burnett*, 24 Jan. 1829, 7 S. 314; *Brown v. Robertson*, 29 May 1845, 7 D. 745.

(*c*) *Shaw v. Steele*, 28 Feb. 1852, 24 Jur. 266, 11 Mar. 1852, 14 D. 762; *Hawarden v. Dunlop*, 31 May 1861, 23 D. 923.

(*d*) *Pennycook*, 20 Dec. 1851, 14 D. 311.

(*e*) See *Pet. Mitchell*, 28 Jan. 1860, 22 D. 632; *Earl of Lauderdale v. Earl of Fife*, 9 Mar. 1830, 8 S. 675; *Pet. Morison*, 18 Jan. 1834, 12 S. 307.

any time put an end to a trust for creditors by a recal of his mandate, accompanied by a tender of payment of the outstanding debts which the trust was intended to secure (a); and the power of recalling the trust seems to include, by necessary implication, the power of making provision for its continuance.

Reserved powers of appointment in marriage-contract trusts.

Distinction in the case of trusts limited to the endurance of the marriage.

Factor will not be appointed where

The grounds on which it was laid down that the parties to marriage-contract trusts had the power of appointing new trustees, are not so apparent. In such cases, no radical right or title remains in the disponent. The purpose of the trust conveyance is the securing of the fund for the future wants of the truster's family,—a purpose which might be defeated in some instances, if the parties were at liberty to transfer the property to the custody of a trustee of their own selection. At the same time, it must be observed that in one class of marriage-contract trusts—we refer to trust conveyances of the wife's property made in contemplation of marriage—the lady retains the radical title, together with a postponed interest contingent on the dissolution of the marriage by the death of the husband without issue (b); and it is at least an open question, whether the husband has not a reversionary interest in property conveyed by him under similar circumstances. This reversionary right in the settlor of estate conveyed for the uses of a marriage-contract trust, may be sufficient to give the party an interest to appoint new trustees; and upon this ground, the cases of *Lindsay* and *Tovey* (c) are more easily reconcilable with the principles of the law of property than has been supposed (d). Upon this branch of the subject, it is only necessary to add, that as the power of reappointment in such cases is not very clear, the Court will not insist on its being exercised, but will appoint a factor if the parties desire it (e).

Before leaving the subject of lapsed trusts, we must add, that where an estate disposed of by trust settlement has been taken up

(a) See Chapter XXXIII., *supra*, p. 165.

(b) *Torry Anderson v. Buchanan*, 2 June 1837, 15 S. 1073; *Cunningham v. M'Leod*, 13 Aug. 1846, 5 Bell, 210, affg. 3 D. 1288; *Martin v. Bannatyne*, 8 Mar. 1861, 23 D. 705.

(c) *Lindsay v. Lindsay*, 19 June 1847, 9 D. 1297; *Tovey v. Tennant*, 11 Mar. 1854, 16 D. 866.

(d) See *Thoms*, Jud. Fac. 28.

(e) *Davidson*, 18 June 1857, 19 D. 862; *Macgeorge*, 8 Mar. 1856, 18 D. 792; *Alcock*, 2 June 1855, 17 D. 785. The Court has even appointed a factor where the contract itself was not a trust conveyance (*Melville*, 8 Mar. 1856, 18 D. 788, a case on which we should hardly be disposed to rely as a precedent).

as intestate succession by the legal representatives of the truster, and possession has followed upon their title, the Court will not appoint a factor, but will leave the beneficiaries to substantiate their claims by an action against the heir in possession (*a*). The reason is obvious. The appointment of a factor, like sequestration of heritable estate, is a remedy properly applicable to cases where there is either no party in possession, or where the possession is recent and disputed. If, therefore, the legal representatives have been allowed to enter into possession upon the title of service or confirmation, the Court does not disturb that possession by summary process. But where an application is presented immediately on the completion of a title by the heir-at-law (*b*), or personal representatives (*c*), and for the purpose of preventing the legal representative from taking possession, a factor may be appointed.

competing
Claimants are
in possession
on a legal
title.

2. It has never been laid down as a general rule, that the insolvency of a trustee is an absolute disqualification. The practice, however, is to accede to any reasonable application for the appointment of a factor on the ground of insolvency or embarrassment of the trustee, especially if the insolvent is a sole trustee, or one whose vote is necessary to make a quorum (*d*). And this is just, because even where the trustee's conduct has been unexceptionable, and his insolvency the result of innocent misfortune, it cannot be said that the trust estate is safe in his keeping. Money paid, or goods delivered to him on behalf of the trust, might be pointed in his hands for his own debts; and mistakes in regard to the terms of a deposit, or investment of the proceeds of trust property, might have the effect of bringing the trust funds under the power of the trustee's creditors. In some cases the objection of insolvency has been obviated by the trustee finding caution; but we doubt whether such

Insolvent
Trustee may
be superseded
by appoint-
ment of Judi-
cial Factor.

(*a*) *Finlay v. Dymock*, 11 Mar. 1854, 16 D. 868; *Marshall*, 5 Jan. 1859, 21 D. 203. In one case, the Court refused to appoint a factor on the ground that the appointment would interfere with the powers of creditors secured upon the estate (*Cunninghame v. Dickson*, 15 Jan. 1839, 1 D. 362). In another case, the appointment was refused because the object of the petitioners was to have the trust defended

at the expense of the estate (*Marshall v. Graham*, 5 Jan. 1859, 21 D. 203).

(*b*) *Fraser*, 15 Dec. 1855, 18 D. 264; *Brown v. Robertson*, 29 May 1845, 7 D. 745.

(*c*) *Barwick*, 27 Jan. 1855, 17 D. 308.

(*d*) See *Towart*, 14 May 1823, 2 S. 305; *Smith*, 15 May 1832, 10 S. 531; *Walker*, 30 May 1837, 9 Jurist, 480; *Soutar's Crs.*, 25 Nov. 1852, 15 D. 89.

precedents would now be followed (a). Trustees may therefore be advised that they are entitled to decline to act with a colleague who has become insolvent; and that, in the event of his insisting on exercising his rights as a trustee, they are entitled to apply to the Court to have the trust superseded.

Superoession
of the Trustee
on the ground
of misconduct.

Any impropriety of conduct on the part of a trustee in relation to the administration, may be made a ground for an application to the Court for the sequestration of the estate and appointment of a factor. Such applications have been granted, for example, in cases where the trustee has illegally attempted to purchase the trust estate (b); or has retained considerable sums belonging to the trust in his own hands, or invested in his own name (c); or has attempted to sell out stock when the money was not required for the purposes of the trust (d).

Appointment
of Factor in
consequence of
the illness or
non-residence
of accepting
Trustees.

3. Where, in consequence of the non-residence, permanent illness, or incapacity of any of the trustees, an acting quorum cannot be brought together, the Court is always disposed to accede to an application for the appointment of a judicial factor (e). Where the temporary purposes of the trust have been fulfilled, and nothing remained to be done but to wind up or distribute the proceeds of the trust estate, the Court has granted authority to the resident acting trustees, although less than a quorum, for that purpose (f). We must refer to a previous chapter for information on the ques-

(a) See *Barry v. Thorburn*, 11 Mar. 1847, 9 D. 917; *Macpherson*, 19 Dec. 1840, 3 D. 315.

(b) The purchase of the estate of a bankrupt by his trustee is a sufficient reason for removing the trustee from his office (*Broun v. Burt*, 23 Dec. 1848, 11 D. 338; *Drew v. Paterson*, 2 Dec. 1825, 4 S. 259).

(c) *Morris*, 27 Feb. 1858, 20 D. 716; *Fraser*, 11 Mar. 1854, 16 D. 867.

(d) *Goold*, 19 July 1856, 18 D. 1318.

(e) *Nisbet v. Fraser*, 31 Jan. 1835, 13 S. 384; *Dean*, 17 Nov. 1852, 15 D. 17; *Stott*, 11 Mar. 1854, 16 D. 867; *Watt*, 13 June 1854, 16 D. 941. See the recent cases of *Smith*, 20 Mar. 1862, 24 D. 838, where the First Division refused to remove an absent trustee,

but appointed a judicial factor; and *Shand*, 20 Mar. 1862, 24 D. 829, where the same Court first allowed the absent trustee to resign, and on the resignation being lodged, appointed a judicial factor with the usual powers. In *Pet. Hill*, 11 July 1855, 17 D. 1104, the Second Division refused to appoint a judicial factor, on the application of a trustee resident in England, and who alleged that he was unable, in consequence of non-residence, to fulfil the duties of the trust in person.

(f) See the cases commented on in Chapter XIV. Vol. I. p. 275. In one case, where the trustee on a sequestrated estate had become insane, the Court allowed a report by the commissioners to be received (*Guthrie*, 21 May 1845, 7 D. 637).

tion, what constitutes a quorum, and when a destination to acceptors and survivors is implied (a).

The doubts which have been entertained in the profession as to the retrospective operation of the Trustee Act, seem to have been so far shared in by the judges of the Court of Session, that in a reported case which arose subsequent to the passing of the Act, authority to resign was granted to a non-resident trustee of a trust which had been in operation before the passing of the statute (b).

Resignation of Trustees.

4. Although, as a general rule, trustees are bound to submit to the opinion of the majority, there are circumstances in which differences of opinion may prevail to such an extent that the administration of the trust is suspended, and where, therefore, a resort to judicial management becomes a matter of obvious expediency. In such cases, the Court exercises a large discretion, and decides, upon a review of the whole circumstances, whether it is most expedient that the trust management should be continued, or that the trustees should be relieved from a position which they have shown themselves incompetent to sustain (c). In effect, the Court is now relieved, in a great measure, from the responsibility of deciding upon such matters by the Act of 1861 (d), enabling trustees to resign without special powers. The professional adviser can have no hesitation in recommending trustees to avail themselves of the privilege of resigning accorded by that statute where irreconcilable differences exist; and if this course is followed, an application, at the instance of the beneficiaries, for the appointment of a factor upon the trust estate, will be granted as a matter of course.

Appointment of Factor, where Trustees cannot concur in the management.

When trustees have lost the confidence of the beneficiaries, or where there are dissensions betwixt them on matters of essential importance, it is often the best course for all parties that the trustees should retire, or that a joint application should be presented for the appointment of a factor; in which case, if both parties concur in requesting that the estate should be placed under judicial management, the application will be granted (e). Again, if there be a

Appointment of Factor in consequence of differences between the Trustees and the parties beneficially interested.

(a) Chapter XII. Secs. 2 & 3.

S. 187; *Home v. Hunter*, 7 Mar. 1833,

(b) *Shand v. MacDonald*, 20 Mar. 1862, 24 D. 829.

11 S. 538.

(d) 24 & 25 Vict. cap. 84.

(c) *Forbes*, 14 Feb. 1852, 14 D. 498; *Adie v. Mitchell*, 19 Dec. 1835, 14 S.

(e) *Taylor v. Taylor's Trs.*, 18 July 1857, 19 D. 1097; 14 Nov. 1857, 20

185; *Laird v. Miln*, 7 Dec. 1833, 12 D. 52.

doubt as to the title of the trustee, the Court will be disposed to accede to an application for the appointment of an interim factor until the question of the trustee's right is tried (*a*). But the mere fact that the management of the trustees has not been satisfactory to those beneficially interested, or that it has been unfortunate in its results, is not *per se* a sufficient ground for superseding the trustees to whom a testator has committed the management of his property; for the very fact of the creation of a trust implies an indisposition on *his* part to rely exclusively on the judgment and discretion of those for whose benefit the trust has been created. When a trust estate has passed into the hands of assumed trustees, the Court will more readily entertain an application for a transference of the estate into the custody of judicial manager, as in this case the element of *dilectus personæ* is wanting (*b*).

Expenses of applications for appointment of Factors.

The expenses connected with the appointment of factors upon trust estates form a preferable charge upon the estate; and after the factory has come into operation, which it does as soon as the factor has found caution (*c*), the factor has the same right of retention for his expenses which the trustee has, in virtue of the primary purpose of the trust disposition (*d*).

Administration of trust estates by Judicial Factors.

The administration of trust estates by judicial factors is regulated by the Acts of Sederunt of 31 July 1690, 25 December 1708, 31 July 1717, and 13 Feb. 1730. Where trustees are also *ex officio* tutors or curators to their constituents, and it becomes necessary to vest the estate *in manibus curiæ*, it is usual to apply for the appointment of a factor having the powers of a guardian, in which case the factory will fall under the jurisdiction created by the Pupils' Protection Act (*e*).

Duties and powers of Judicial Factors.

The subject of the duties and powers of judicial factors is an extensive one. Any summary we could give of the various enactments and provisions of consuetudinary law upon this subject, would be incomplete, and therefore valueless; unless accompanied by an analysis of the decided cases,—which are very numerous, and are

(*a*) *Christy v. Paul*, 10 July 1834, 12 S. 916. 962; *Macfarlane v. Donaldson*, 12 May 1835, 13 S. 725.

(*b*) *Christy v. Paul*, *supra*.

(*c*) *Donaldson*, 18 June 1833, 11 S. 740; *Fullarton*, 11 July 1833, 11 S.

(*d*) See this subject treated in Chap. XXV. (II. 64).

(*e*) 12 & 13 Vict. cap. 51; see *Pet. Morison*, 21 Feb. 1857, 19 D. 504.

besides too closely identified with the Guardianship cases to admit of separate discussion. This would open up a much wider field of investigation than we are disposed to enter upon, at the conclusion of a subject which is in itself very comprehensive, and has already led us considerably beyond the limits which we had originally laid down. There is the less reason for entering, in this place, upon the duties and powers of judicial factors and curators, as the subject has been separately treated in a work already in the hands of the profession (*a*).

By the 74th section of the Bankruptcy Act, the Lord Ordinary has power to remove any trustee on a sequestrated estate, upon the application of one-fourth in value of the creditors (*b*). As the Court has power to appoint new trustees upon private trusts, it can scarcely be doubted that it has also jurisdiction to remove trustees, when danger is to be apprehended from their continuance in office. In practice, however, this is rarely, if ever, done (*c*). The appointment of a factor is the remedy given in practice, sometimes with the additional precaution of sequestration of the estate (*d*). The chief distinction between removal and sequestration is, that in the latter case the powers of the trustee are merely suspended, and may be revived by a recal of the sequestration; while, in the case of a removal, the original appointment is abrogated. Sequestration of the estate, although a stronger measure than the mere appointment of a factor, does not carry with it that direct censure of the conduct of the trustee which is necessarily implied in a sentence of deprivation of office.

Removal of
Trustees, and
sequestration
of the trust
estate.

(*a*) We refer to Thoms on Judicial Factory, and more especially to the Third Chapter, pp. 154 *et seq.*

(*b*) See *Baillie v. Anderson*, 18 July 1844, 6 D. 1376; *Lowden*, 31 Jan. 1835, 13 S. 389; *Cabbell v. Miller*, 8 July 1828, 6 S. 1101.

(*c*) See *Pet. Smith*, 20 Mar. 1862, 24 D. 838; *Pet. Hay*, 19 Feb. 1861, 23 D. 594; *Butchart v. Butchart*, 1 July

1851, 13 D. 1258, and authorities there cited.

(*d*) *Hawarden*, 31 May 1861, 23 D. 923; *Morris v. Bain*, 27 Feb. 1858, 20 D. 716; *Barry v. Thorburn*, 11 Mar. 1847, 9 D. 917; *Macpherson*, 19 Dec. 1840, 3 D. 315; *Home v. Hunter*, 7 Mar. 1833, 11 S. 538; *Hamilton v. Littlejohn*, 18 Mar. 1836, 2 S. & M'L. 355.



PART IV.

TRUST CONVEYANCING.

CHAPTER XLVII.

SUGGESTIONS AS TO TAKING INSTRUCTIONS FOR THE PREPARATION OF WILLS.

WE propose, as introductory to the last division of this treatise, to offer a few suggestions for the use of practitioners in taking instructions for the preparation of settlements. The duty resting on an agent in taking instructions for testamentary deeds is a very delicate, as well as a responsible one; and we are afraid its importance is often not sufficiently appreciated.

The duty of the agent is often rendered more onerous by the indecision in many cases, and the almost entire ignorance in others, on the part of the testator, as to how, and the particular terms in which, he shall leave his means; and not infrequently the settlement is as much the will of the agent as of the maker.

Frequently the agent, without making any inquiry as to the position of the testator's means, the manner in which they are affected by marriage-contracts, or other deeds of a family nature, or without explaining the legal rights of husband and wife, or children, or of the heir-at-law by the operation of the law of death-bed, simply ascertains the wishes of the testator, and embodies them in a settlement; and this settlement is signed by the maker without much explanation, and without any very distinct understanding on his part of the real effect of the clauses which it contains. It is the duty of the agent, however, in many cases, not

only to draw, but to advise and explain; remembering that the testator's intention can only be truly elicited by having presented to his consideration the arrangements most suitable to his views and circumstances. To the right discharge of his duty as a professional adviser, it is not enough that the solicitor is conversant with the various modes of disposition in which the law allows a testator to direct the enjoyment of his property; it is essential that he should also be informed as to the circumstances of the testator's family, and the situation of his fortune. To a want of complete information on these points we must attribute many of the inconvenient schemes of testamentary disposition which are met with in practice. Were the legal rights, which the maker cannot by any act of his own disappoint, the consequences resulting from the operation of the law of death-bed, and the real effect of the expressions used in testamentary deeds, especially in questions of liferent and fee and vesting, carefully explained in all instances, we are satisfied that very many of the numerous litigations which are raised upon the meaning and proper construction of trust settlements would be prevented.

It is of course impossible to make suggestions to meet every variety of circumstances. The duty of an agent must, to a great extent, depend upon the circumstances of each particular case; and we shall only notice what we consider to be the agent's duty under circumstances which most frequently occur in practice.

Inquiry to be made as to property subject to conditions of marriage-contract;

or of which the testator has the power of disposal.

1. When the maker of the settlement is married, the agent ought to ascertain whether he or she has entered into a marriage-contract, and, if such a deed exists, to ascertain the terms of its provisions. He will thus be able to explain what effect these provisions have upon the power of disposal of the maker, and to take distinct instructions with these provisions in view. He should also ascertain whether the maker has any power of disposal of any fund of which he or she may not have the absolute property, in order that such a power may be specially dealt with, and any question as to whether it is sufficiently exercised by the execution of a general settlement obviated. He should also ascertain whether there is any property in England or abroad; and if there is English property, he should introduce into the dispositive clause the words "devise, legate, and bequeath."

2. Should there be no marriage-settlement, the agent should explain the legal rights of the husband or wife, and of children, and the impossibility of these rights being limited by a testamentary settlement.

Testator should be made aware of the legal rights of the family.

3. Having ascertained how the testator's means are affected by marriage-contract or other deeds, and explained the rights which cannot be disappointed, it should be the object of the agent to apprehend distinctly the wishes of the testator, and to carry these into effect; and in doing so, many explanations will require to be given as to the meaning and effect of various clauses usually inserted in settlements. We shall advert to some of those of most frequent occurrence.

Ascertainment of the testator's intention regarding the destination of his property.

(1.) The first provision of a settlement generally contains a direction for payment of debts. In the case where an heritable property, appointed to be conveyed to a special legatee, is burdened with debt, it should be ascertained whether the debt is to be paid out of the general estate; or in other words, whether it is to be considered a debt included in the first purpose of the settlement, or whether it is to form a burden upon the property. If there are marriage-contract provisions, it should also be ascertained whether these are to be paid as debts, or to be held as satisfied by the provisions of the testamentary settlement, in order that the wishes of the maker in this respect may be given effect to.

Payment of debts.

Marriage-contract provisions, whether to be dealt with as debts.

(2.) In the case of simple legacies, the agent ought to ascertain whether, in the event of the legatee predeceasing the maker, the subject of the bequest is to pass to the legatee's heirs and assignees, to his issue only, or to the residuary legatees; and, where legacies are left to two or more persons, he ought to inform himself as to whether the survivor or survivors are to succeed, should any of them predecease, or if the heirs of predeceasers are to take a joint interest along with the survivors, and if so, to provide accordingly.

Destination of the subject of legacy on failure of legatee.

(3.) In regard to provisions of liferent to parents and fee to children *nascituri*, the wishes of the maker should be carefully ascertained. We believe that, in provisions of this nature, the intentions of the maker have not infrequently been frustrated by the carelessness or ignorance of the agent, or from the real wishes of the maker not having been clearly understood. The agent should know whether the maker intends that the liferent shall be a liferent use,

Liferent and fee.

Mode of effectuating the testator's intention.

or whether it is to be a liferent only in form and a fee in its operation and effect. In consequence of the affirmance of the judgment in the case of *Ferguson's Trs. v. Hamilton*, since our first volume was printed, we take the opportunity of reminding conveyancers that the creation of a trust is not sufficient to preserve a fee for unborn children, either alone or in conjunction with those born in the testator's lifetime, unless the destination is either restricted to a liferent use alienably, or that the trustees are directed to retain the fund under their control during the subsistence of the liferent. The conveyancer will also be careful to prevent any question as to the right to the fee conferred upon the children, by declaring whether all the children born of the liferenter, although some of them should predecease him, are to participate in the fee; or whether only those children who survive the liferenter and the period of division, and the children of those who may predecease, are entitled to do so, and the proportions in which they are to succeed.

Whether fee to be contingent on survivance of the liferenter.

Residuary bequests.

Application of annual proceeds.

Duty of agent to ascertain testator's intention in relation to vesting.

(4.) But perhaps the instructions attended with most difficulty, and which require the greatest care, are those which relate to residuary bequests. Frequently a liferent is given to one party and the fee to another or other parties. Sometimes the annual proceeds are directed to be applied for a particular purpose during a certain period, or for a time dependent upon circumstances, with an ultimate destination of the fee; and it is in reference to the proper construction of these provisions, or provisions of a similar kind, that litigation has most frequently arisen. There can be no doubt that if the difficulties connected with the destination of contingent interests and the ascertainment of the period of vesting, were fully explained to the makers of testamentary deeds, and their intention as to the period of vesting accurately ascertained, litigation would be much less frequent in reference to residuary bequests. It is desirable that, in every case where a question of vesting is likely to arise, the intention of the testator as to when the vesting of the fee is to take place should be ascertained by his agent, and provision made for carrying out his wishes in language as to the meaning of which there can be no misconception. Too much reliance ought not to be placed upon a clause declaratory of the period of vesting; for it must be remembered that the vesting of a contingent interest

is in most cases necessarily determined by the conditions of the destination, and, in case of repugnancy, the testator's express disposition of his estate must override any declaration of intention. From the cases referred to in the two preceding chapters, it will be seen that litigation in regard to the vesting of residuary bequests has most frequently resulted from uncertainty as to the period to which words of survivorship are to be referred. In all cases where an interest is to be given to survivors or to a conditional institute, it should be clearly stated whether the property is to pass in the event of the legatee surviving the testator, or in the event of his surviving the prior legatee, or finally, in the event of his outliving the period of distribution. A testator, while he postpones the period of vesting, may wish to give the legatee a power of disposal or division among his children should he predecease, and special inquiry and provision should be made as to this.

The mode of giving expression to the usual reciprocal institution of survivors and the issue of predeceasing legatees, deserves more attention than it has hitherto received. The decision of the House of Lords in *Buchanan v. Young* will remind the practitioner that issue do not take along with survivors unless expressly instituted. There are two modes of expressing the usual destination to a family, equally correct in principle, but not always identical in legal effect; namely, (1) by a joint destination without substitutions; and (2) by a destination in specified shares, with substitutions. Under the first, the testator gives the property, for example, "to the surviving children of A. B., and (or jointly with) the issue of any of his children who may predecease;" adding a declaration that the division is to be *per stirpes*. This form can only be used when the shares of all the children are to vest at one and the same time; *e.g.*, at the majority of the youngest; and when those shares are equal. The other form of destination to which we have referred, consists of three purposes: (1) a destination to the children in equal (or unequal) shares; (2) a substitution of the *issue* of each child to that child's original share; and (3) a destination over to the surviving children jointly with the issue of predeceasing children, in the event of any other child dying *without* issue. Each of these three purposes must be distinctly expressed—not left to implication; otherwise the testator's intention may be frustrated.

Destination to children of a family, or joint legatees, how to be framed.

Revocation of
prior settle-
ments.

(5.) If the maker has already executed a settlement, the agent ought to inform himself as to whether the maker wishes that settlement to take effect in the event of the new settlement becoming ineffectual by the law of death-bed; and if such should be his intention, the agent will of course take care not to insert a clause of revocation in the new settlement.

Law of death-
bed.

(6.) Should the maker be labouring under disease when the settlement is executed, the law of death-bed and the right competent to the heir should be explained to him, and he should be recommended to go to kirk or market as soon as practicable after executing the settlement, if his health permits him to do so.

Powers of the
trustees.

(7.) As to the powers to be conferred on the trustees, the maker of the settlement will in most cases be disposed to be guided by the advice of his agent. In the forms of trust settlements which follow, we have been solicitous to include examples of all the powers likely to be required in ordinary practice. Circumstances must determine how far it is advisable in any particular case to give a wide discretion to trustees. The duration of powers in private trusts should not be longer than is necessary for the purpose of providing for the exigencies of the testator's family, or those to whom he stands in *loco parentis*. Hence, as a general rule, a discretionary trust should not be kept up for the benefit of grandchildren. Care should also be taken, in framing a trust settlement, to distinguish between a power of sale and a direction to sell; although, since the changes in the law as to succession duties, the risk of litigation in consequence of ambiguity in this particular has been greatly diminished.

Advances,
whether to be
debited to
account of
children's pro-
visions.

Partnership
interests, how
to be dealt
with.

We think we have noticed the principal points to which the attention of an agent should in ordinary cases be directed. There are, of course, many special cases requiring the attention of the agent. For example, when the maker has a family, some of whose members have attained majority, it should be ascertained whether any advances have been made to any of the family, and if so, whether they are to be imputed as part payment of the provisions under the settlement. In the case where the maker is a partner of a private company, it should be pointed out to him that his executors are bound to realize his interest with as little delay as possible; and should he wish his partners to have time to pay out his share,

special provision ought to be made to that effect. If the maker is proprietor of minerals which have not hitherto been worked, and if the trust created by the settlement is to be one of considerable endurance, the expediency should be brought under his notice of conferring ample powers upon the trustees in relation to the working and leasing of the minerals. But the duty of the agent in all special cases, must of course depend upon the circumstances of each case; and he should make it his object to inform himself of all the circumstances in regard to which specific provision may be necessary, and to bring them under the notice of the maker in order that his wishes may be distinctly ascertained and carried into effect.

Mineral subjects.

STYLES OF TRUST SETTLEMENTS AND COLLATERAL DEEDS.

SECTION I.

STYLES OF TESTAMENTARY DISPOSITIONS.

No. I.—*General Settlement, conveying whole Estate to one person, under burden of Legacies in different forms. Exclusion of jus mariti of the Husbands of the Beneficiaries. Note as to conveyance in fee and liferent.*

Absolute disposition of whole estate.

I, A. B. of X., being desirous of settling the succession to my means and estate, so as to prevent disputes after my decease, do therefore GIVE, GRANT, ASSIGN, DISPONE, CONVEY, and MAKE OVER [*if English property is intended to be included, insert after "dispone,"—devise, legate, and bequeath*] to and in favour of C. D. of Y., and his heirs and assignees, heritably and irredeemably, All and Sundry lands, tenements, heritages, goods, gear, debts, and sums of money, and in general the whole estate, heritable and moveable, real and personal, which shall be belonging and owing to me at my decease [*should no special provision be intended as to a fund of which the maker has the power of disposal, the following clause may be added: including any fund of which I may at the time of my decease have the power of disposal*], together with the whole rents, interest, dividends, profits, and produce thereof, and the writings, title-deeds, vouchers, and instructions of the premises : AND I hereby NOMINATE and APPOINT the said C. D. to be my sole executor and universal intromitter with my moveable means and estate, with power to give up inventories thereof, confirm the same if needful, and generally to do everything competent to the

Nomination of donee as executor.

office of executor : BUT THESE PRESENTS are granted, and shall be accepted by the said C. D., and the foresaid lands and other heritages hereby conveyed are disposed with and under the burden of the payment of my whole just and lawful debts, and sick-bed and funeral charges, and of the payment of the following legacies which I leave and bequeath to the parties after named—viz. : FIRST, To my nephew, E. F., the sum of L. sterling, whom failing, to his issue equally among them ; SECOND, To each of G. H. and I. K. the sum of L. sterling, and failing both or either of them leaving issue, then the sum provided to the deceasers or deceiver shall be paid to such issue equally among them, *per stirpes* ; and in the event of the decease of either of them without leaving issue, then the sum provided to such deceiver shall be paid to the other of them, whom failing leaving issue, to such issue equally among them *per stirpes* ; THIRD, To each of the three daughters of my uncle, M. N., the sum of L. sterling, and failing all or any of them leaving issue, the sum provided to the deceasers or deceiver shall be paid to their or her issue equally among them *per stirpes*, and in the event of the decease of any of them without leaving issue, then the sum provided to such deceiver shall be paid to the survivors or survivor jointly with the issue of the other who may have predeceased leaving issue, such issue being entitled equally to the share to which their parent would have been entitled if in life (a) ; all which legacies shall bear interest from the first term of Whitsunday or Martinmas after my decease until paid ; FOURTH, To the Society of [insert the designation of the society as accurately as possible] the sum of L. , to be paid at the first term of Whitsunday or Martinmas after my decease, with interest from that term until paid, which legacy shall be paid to the secretary or treasurer of that institution for behoof thereof, whose receipt shall be sufficient exoneration for the same ; and also under burden of any other legacies which I may hereafter bequeath by any codicil or signed memorandum expressive of my intention : And I appoint the said C. D., his heirs and assignees, to be my residuary legatee or legatees : AND I PROVIDE and DECLARE that the whole bequests hereby made, so far as in favour of or descending upon females,

Disposnee to pay testator's debts.

Disposnee burdened with legacies.

Legacy to two persons jointly.

Legacy to three or more persons jointly. Conditional institution of issue.

Legacy to a charitable institution.

Appointment of residuary legatee.

Exclusion of *jus mariti*.

(a) For abridged forms of joint legacies, with reciprocal substitutions in favour of issue, see Style No. IV., p. 413.

shall be expressly seclusive of the *jus mariti* and right of administration of husbands, and shall not be affectable by their debts or deeds, or by the diligence of their creditors : AND I further PROVIDE and DECLARE that such of the foregoing bequests as are in favour of parties who may be in pupillarity or minority at the fore-said period of payment, may be paid to their legal guardians for their behoof : AND I RESERVE my own liferent use and enjoyment of the premises, and full power and authority to me, at any time of my life, and even on death-bed, to cancel or alter these presents at pleasure : AND I DISPENSE with delivery hereof, and declare these presents, although lying by me or in the custody of any other person at my death, to have the full effect of a delivered evident, any law or custom to the contrary notwithstanding : AND I CONSENT to registration for preservation.—In witness whereof, etc.

Legacies may be paid to guardians.

Reserved power to revoke.

Delivery.

Registration.

NOTE.—Sometimes, when a testator wishes to settle his estate upon one party in liferent and the children of that party in fee, he executes a settlement disposing his estates to the liferenter “in liferent for his liferent use allenary, and to his children in fee ;” but property meant to be settled in this manner can be most effectually secured by means of a trust, and is so settled in practice. Examples of the manner in which the object of the settlor in the case under consideration is carried out by means of a trust, will be found in Styles No. IV. and No. V.

No. II.—*General Settlement conveying whole Estate to two or more parties jointly. Conditional Institution of Issue.*

I, A. B. of X., in order to settle the succession to my estate, real and personal, after my decease, and for other good causes and considerations, do hereby GIVE, GRANT, ASSIGN, DISPONE, CONVEY, AND MAKE OVER to and in favour of my brothers, C. and D., and my sisters, E. and F., equally, and to their respective issue *per stirpes* equally among them, and failing any of them without leaving issue, then to the survivors of the said C., D., E., and F., and the lawful issue of any of them who may have predeceased me (the division being *per stirpes*), All and Sundry lands, tenements, heritage, goods, gear, debts, and sums of money, and in general the whole estate,

Absolute disposition to four persons, with destination.

heritable and moveable, real and personal, now owing and belonging, or which shall be owing and belonging to me [see No. 1, as to where there is a power of disposal] at the time of my decease; together with the whole rents, interests, dividends, profits, and produce of the premises due at my decease, or to become due thereafter, and the writings, title-deeds, and securities of the same: BUT SUBJECT ALWAYS to the burden of payment of all my just and lawful debts, sick-bed and funeral charges: AND I hereby NOMINATE and APPOINT the said C., D., E., and F., and the survivors or survivor of them, to be my sole executors and executor, and universal intromitters and intromitter with my whole moveable subjects and estate, with power to give up inventories, confirm the same if needful, and in general to do everything which to the office of executor belongs: And I declare [as in Style No. I.].

Disponees burdened with testator's debts.
Appointment of executors.

No. III.—*Mutual General Settlement by Spouses, conveying whole Estate to the Survivor absolutely. Variations upon the clause reserving right to revoke.*

We, A. B. of X., and Mrs C. D. or B., spouses, for the love, favour and affection we bear to each other [if the power of revocation is intended to be restricted, say—In consideration of the provisions herein contained, granted by each of us in favour of the other, and for other good and onerous causes], do therefore, with mutual advice and consent, GIVE, GRANT, ASSIGN, and DISPONE to and in favour of the survivor of us, and the heirs and assignees whomsoever of the survivor, All and Sundry lands, tenements, and heritages, and also all debts, sums of money, and effects, and in general all estate, heritable and moveable, real and personal, wheresoever situated, now owing and belonging, or that shall be owing and belonging to the first deceiver, with the whole writings, vouchers, and securities, and the rents, interest, profits, and produce of the premises: And we respectively bind and oblige our heirs-at-law and executors to make up titles if required, and to grant, execute, and deliver all writings necessary and requisite for vesting the estate of the first deceiver in the person of the survivor: AND we NOMINATE and APPOINT the survivor to be the executor of the first deceiver, excluding all others from that office: BUT

Mutual disposition to survivor and heirs.

Survivor appointed executor.

Dispossee bur-
dened with
debts.

Reserved
power to alter.
[See note.]

THESE PRESENTS are granted, and shall be accepted by the survivor and his or her foresaids, under the burden of the payment of the whole just and lawful debts, sick-bed and funeral charges, of the first deceiver: RESERVING always to us and each of us full power to alter, innovate, or revoke these presents, in whole or in part, as we may see proper: But dispensing with the delivery hereof, and declaring always that the same, so far as unaltered or unrevoked as aforesaid, shall be effectual, though found lying by either of us at death, or in the custody of any other person, any law or custom to the contrary notwithstanding: And we consent to the registration hereof in the Books of Council and Session, or other Judges' books competent, therein to remain for preservation; and thereto constitute

procurators.—In witness whereof, etc.

NOTE.—If each party is only to be entitled to revoke so far as regards his or her own estate, the clause of revocation may be expressed in the following terms:—

Power to each
party to revoke
his own part.

“RESERVING to us full power and liberty to alter or revoke these presents at pleasure, so far as regards the estate hereby conveyed by us respectively.”

If it is intended that in the event of either party exercising the power of revocation, he or she shall not take under the mutual deed, the following words may be added:—

Party exer-
cising power
of revocation
to forfeit reci-
procal provi-
sions.

“PROVIDING that in the event of either party exercising the power of revocation hereby reserved, then the interest of the party so revoking, conferred by the other of the said parties, in the means and estate hereby conveyed, shall cease, and be held to be also revoked.”

SECTION II.

STYLES OF TRUST SETTLEMENTS *mortis causa*.

No. IV.—*Settlement of whole Estate, with discretionary powers as to realization, in trust for payment of debts and legacies, and distribution of residue amongst Testator's Family: interests to vest at majority or marriage. Additional annuity to Widow. Examples of simple and joint bequests with conditional institutions: specific legacies; legacy in fee and life, with powers of division and restriction, etc. Special destination of heritable subjects. Residuary destination. Special powers of advancement and restriction of Children's interests. Form of special clause of immunity.*

I, A. B. of X., for the settlement of my succession during my life, and in order to prevent disputes thereanent after my decease, do hereby GIVE, GRANT, ASSIGN, DISPONE, CONVEY, and MAKE OVER *[where English property is meant to be conveyed, add the words, "DEVISE, LEGATE, and BEQUEATH"]* to and in favour of

General conveyance to trustees.
English property.

and to any other person or persons whom I may hereafter nominate and appoint, or who may be lawfully assumed into the trust, and to the acceptors and survivors and acceptor and survivor of them, the major number of them accepting and surviving and resident in Great Britain from time to time being a quorum, and to the heirs of the longest liver of them, as trustees and trustee for the ends, uses, and purposes after mentioned, and to the assignees of the said trustees or their said quorum, or their foresaids, All and Sundry lands, tenements, tacks, heritages, debts, goods, gear, effects, and sums of money, shares in trading or other companies, stock-in-trade, and in general the whole subjects and estate, heritable and moveable, real and personal, owing and belonging, or which shall be owing and belonging to me *[see provision in regard to power of disposal in Style No. I.]* at my decease, with the rents, interest, profits, and produce, and writings, titles, and vouchers thereof. *[A special conveyance of the truster's heritable estate to the trustees is not now expedient, as their title may be completed by no-*

Special conveyance.

Nomination of executors. *tarial instrument.*] AND I NOMINATE and APPOINT the said trustees and their foresaids to be my sole and only executors and executor, and universal intromitters and intromitter with my personal means and estate, with full power to give up inventories thereof, and confirm the same at pleasure, and generally to do everything pertaining to the office of executor : BUT THESE PRESENTS are granted, and are to be accepted by my said trustees and their foresaids in trust, with the powers and privileges, and for the ends, uses, and purposes following, viz. : THAT THEY may, as they are hereby authorized and empowered to do, call, sue for, realize, uplift, receive, and discharge the whole means and estate, debts, and effects due and belonging, or which may be due and belonging to me at my decease : THAT THEY may continue to carry on, for behoof of my estate, and for such period and on such terms as they may think expedient, any business in which I may be engaged at my decease, either by myself or in company with others: THAT THEY may make such arrangements and settlements relating to my shares and interest in any business in which I may be interested along with others, as they may think advisable, and may allow the said shares and interests to remain in the hands of my surviving partners or partner for such period or periods, and on such terms, as they in their sole discretion shall think conducive to the interest of my estate [*see variation on this clause in Style No. VI.*] : THAT THEY may adjust and settle the extent, nature, and boundaries of any property which may belong to me, or in which I may be interested along with others ; that they may enter into such arrangements and submissions or arrangements as they may deem proper, or as may be necessary for dividing, or may themselves agree on such terms as they may think proper for dividing, any property in which I may have a joint interest : WITH POWER to sell, or concur in selling, realizing, and converting into money, any lands, minerals, or other heritages, as well as any personal estate or effects, belonging to me or in which I may be interested, and that either by public roup or private bargain, and in whole, or in such lots and for such price or prices or other consideration as they may think proper : THAT THEY may feu or concur in feuing the said lands and heritages for such feu duty as they may think adequate ; that they may let or concur in letting, or may work or concur in working, the mines, metals, and minerals therein :

Declaration of trust and special powers.

Power to realize ;

to carry on business ;

to enter into arrangements with partners ;

to settle boundaries of estate, and to divide.

Power of sale.

Power to feu.

THAT THEY may let or concur in letting the said lands and moveables, or any part or portion thereof, for such period and on such terms as they may think proper: THAT THEY may borrow money to such extent as they may think proper for the purposes of the trust upon my lands and estate, and grant bonds and dispositions in security over the same therefor, containing powers of sale and all other usual and necessary clauses: THAT THEY may raise, commence, and follow forth all actions, suits, and diligences, and grant all deeds and writings of whatever nature and description, that may be necessary for carrying the powers foresaid, or any of them, into effect, binding my estate in absolute warrandice: AND I PROVIDE and DECLARE that the receipt of my said trustees shall be a sufficient discharge to all parties dealing and transacting with them in their character of trustees, and that such parties shall have no concern with or right to inquire respecting the application of monies paid by them to my trustees or the management of my means and estate: AND I further PROVIDE and DECLARE that any partners or partner with whom I may be associated, and any of the beneficiaries under my settlement, may be an offerer for, and purchaser of my heritages and effects, or any of them, at such price and on such terms as my trustees may think proper, whether at public or private sale: AND WHEREAS I am entitled to certain provisions under the settlements of the deceased C. D. of Y., in reference to whose succession certain questions have arisen, my trustees may, and they are hereby authorized and empowered, not only to settle, uplift, and receive my whole right and interest in the estates of the said deceased C. D., and receive all payments, dispositions, and conveyances that may be necessary, but also to compromise my claims upon the said estate, and take part for my whole right and interest thereon, and for that purpose to enter into any submission or reference they may think proper for the purpose of ascertaining my right and interest therein, or in any way relative thereto, or to make such arrangements with the trustees acting under the settlements of the said deceased C. D., and the beneficiaries under the same, in relation to my rights and interests therein, as they may in their discretion consider conducive to the interest of my estates, or desirable for saving litigation; and specially, without prejudice to the said generality, my said trustees may relinquish such portion of my claims and interests in the said

Power to let.

To borrow on security;

to raise and prosecute actions.

Trustees to have power to grant valid discharges.

Beneficiary or partner may be purchaser of trust estate.

General discretionary power to compromise, refer, or settle question as to a Disputed Succession.

estate as they may think proper, concur in any arrangement with the beneficiaries, or any of them, in the said estates, which they in their sole discretion may consider beneficial, and may make such payments, or enter into such obligations, binding my estates in absolute warrandice in regard to my rights and interests in the said estates, as they in their sole discretion may consider beneficial :

Purposes of trust. AND my said trustees and executors shall HOLD and APPLY my means and estate, and the produce and proceeds thereof, so far as realized, for the ends, uses, and purposes following—viz. : IN THE FIRST PLACE, in payment of all my just and lawful debts, sick-bed and funeral charges, and of the expenses of executing this trust, which debts, charges, and expenses my said trustees may pay without requiring legal constitution ; IN THE SECOND PLACE, in implement, so far as the same may not have been implemented, of the provisions contained in my ante-nuptial contract of marriage with M. N. or B., dated the day of : IN THE THIRD PLACE, in payment to the said M. N. or B., my wife, in the event of her surviving me, of a free yearly annuity of L. sterling during all the days and years of her life, in addition to the annuity provided to her by the said ante-nuptial contract of marriage, beginning the first term's payment of the annuity hereby provided at the term at which the first term's payment of the said annuity provided by the said ante-nuptial contract of marriage is payable, and payable at the terms, in manner, and with interest and penalty, as is provided in the said ante-nuptial contract of marriage, with regard to the said annuity thereby provided to the said M. N. or B. : BUT DECLARING, that in the event of the said M. N. or B. entering into a second marriage, the said annuity hereby provided to her shall be reduced and restricted to the sum of L. *per annum*, beginning the first term's payment of the said restricted annuity at the first term of Whitsunday or Martinmas occurring after her second marriage, and payable the said restricted annuity at the terms, in the manner, and with interest and penalty as provided with regard to the said annuity of L. *hereinbefore* provided to her : AND WHICH ANNUITY and restricted annuity hereby provided to the said M. N. or B. shall be alimentary, and not affectable by her debts or deeds, or attachable by the diligence of her creditors : IN THE FOURTH PLACE, in payment to Mrs E. B., my

1. Payment of debts and expenses.

2. Implement of marriage-contract provisions.

3. Additional annuity to testator's widow,

restrictable on second marriage,

and declared alimentary.

4. Alimentary

mother, in the event of her surviving me, of a free yearly annuity of L. sterling during all the days and years of her life that she shall survive me, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas occurring after my death for the half year succeeding, and the next term's payment at the term of Whitsunday or Martinmas thereafter, and so forth, half-yearly, termly, and continually during all the days and years of her life, with one-fifth part further of each term's payment in name of liquidate penalty in case of failure in the punctual payment thereof, and the interest of each term's payment, at the rate of L.5 per cent. *per annum*, from the time the same becomes due till payment; which annuity hereby provided to the said Mrs E. B. shall be strictly alimentary, and not affectable by her debts or deeds, or attachable by the diligence of her creditors :

annuity to
testator's
mother.

IN THE FIFTH PLACE, in payment of the following legacies and bequests : (1) To E. E. the sum of L. ; (2) To F. F., whom failing, to his lawful issue *per stirpes*, the sum of L. ; (3) To G. G., and his heirs and assignees, the sum of L. ; (4) To H., I., and K., children of L. L., equally, and to their respective issue *per stirpes*, and failing any of them without leaving issue, then to the survivors or survivor of the said H., I., and K., jointly with the issue of any of them who may have predeceased me (the division being *per stirpes*), the sum of L. ; (5) To the children of M. N. who may survive me, jointly with the issue of any of them who may predecease me, such issue being entitled equally among them *per stirpes* to the share to which their parents would have succeeded if in life, the sum of L. ; (6) To each of the children of P. Q. who may survive me, the sum of L. , and the like sum of L. to the issue *per stirpes* of any child of the said P. Q. who may predecease me ; (7) To the Society of the sum of L. , to be paid to the treasurer or secretary of the said society for behoof thereof, whose receipt shall be a sufficient exoneration to my trustees ; (8) To R. R. and his, etc. [*as in previous numbers*], all the Number Two Guaranteed Stock of the S. and T. Railway Company which I may possess at the time of my decease ; and also any one of the pictures that may be in my house at X. at the time of my decease, to be selected by the said R. R. ; (9) I LEAVE and BE-

5. Payment of
legacies.
Simple lega-
cies.

Joint legacies.

To children of
a family.

To a society.

Specific lega-
cies.

Legacy in fee
and liferent ;

QUEATH the sum of L. to V. W. in liferent, for her liferent alimentary use allenary, and to her children in fee, subject to the destination and under the conditions after mentioned; and I direct my said trustees either to pay the same to the said parties for their respective interests of liferent and fee; or, if they shall deem it more expedient, to invest the sum hereby bequeathed in their own names, and apply the annual income and produce for behoof of the said V. W. in liferent, for the alimentary liferent use of herself, and also of such of her children as may remain in family with her until they respectively attain to majority or are married; BUT PROVIDING that they shall be entitled to apply the whole, or such part of the principal as they may think proper, for the alimentary support and benefit of the said V. W. and her children foressaid: AND my said trustees SHALL MAKE PAYMENT of the capital or fee of the said sum, or the portion thereof which may be remaining, to the children of the said V. W., in such proportions, at such terms, and subject to such conditions (including a power to restrict the interests of any of the children in their shares to a liferent alimentary interest, and to destine the fee to their issue) as the said V. W. may appoint by any writing under her hand, and failing such appointment, then to the children of the said V. W. equally, whom failing, to the survivors of them, jointly with the issue of any child who may die leaving issue; PAYABLE in the case of sons on their respectively attaining the years of majority, and in the case of daughters on their respectively attaining to the years of majority or being married, whichever of these events shall first happen; and the annual interest of the shares prospectively falling to any of my said legatees who may not have attained to majority at the death of the said V. W., shall be paid to their legal guardians for their behoof; and failing issue of the said V. W., or if there shall be no issue surviving the period appointed for payment of the fee or capital of this legacy, the same, or such part thereof as may be remaining, shall revert to and form part of my residuary estate; DECLARING that my said trustees shall be entitled, during the lifetime of the said V. W., with her consent, to make payment to any of her children of such part of the fee of the said sum as they may think proper, to account of the share to which each child may be prospectively entitled: IN THE SIXTH PLACE, I direct my said trustees

with power of advancement.

Destination of fee to the surviving children, with reciprocal institution of issue;

term of payment;

anticipation of payment.

6. Special des-

to convey to G. B., my eldest son, and the heirs of his body, my property called Y., in shire, such conveyance to be executed in favour of my son and his family as soon as he shall attain the years of majority; and failing my said son and the heirs of his body before the period when he or they would be entitled to demand a conveyance as aforesaid, the said property shall form part of my residuary estate : AND IN THE LAST PLACE, my said trustees and their foresaids shall [insert here a positive direction to sell and convert the estate into cash, if this is thought expedient] HOLD, APPLY, PAY, and CONVEY the whole rest, residue, and remainder of my means and estate, and the interest and other annual produce thereof, including the principal sum or sums which may be set apart to meet the annuities hereinbefore provided, when and as the same or any part thereof may be set free by the death or second marriage of the said M. N. or B., or by the death of the said Mrs E. B., to and for behoof of the lawful child or children of me, the said A. B., and the issue of such of them as may predecease the term of payment thereof, payable in such proportions, at such terms, on such conditions, and under such restrictions as I may direct by any writing under my hand; AND FAILING any such writing, then to and for behoof of, and equally among, all my lawful children, payable to them in the case of sons on their respectively attaining to the years of majority, in the case of daughters on their attaining to the years of majority or being married, whichever of these events shall first happen : AND IN THE EVENT of any of my said children dying before the said period of payment, leaving lawful issue, such issue shall be entitled, equally among them, to the share to which their parent would have been entitled if in life; and in the event of any of my said children dying before the said period of payment without leaving lawful issue, the share of such deceiver, so far as unpaid or not conveyed, shall fall to and be divided equally among the survivors and survivor of my said children, jointly with the lawful issue of any of them who may have deceased leaving children, such issue succeeding equally among them to the share to which their parent would have been entitled if in life; and the share falling to the minor representatives of any of my children who may predecease shall be paid over to their lawful guardians for their behoof : AND I DIRECT my trustees and executors to hold

tinations of heritable estate.

Residuary destination.

Residue to be divided among testator's children.

Failing division, residue to be payable at majority or marriage.

Institution of issue jointly with surviving children.

Income of

trust estate appropriated to maintenance of family.

Extent of beneficiary's right and restrictions thereon.

Interest to vest on payment.

Trustees to have power to postpone payment,

and to vest children's provisions in trustees for behoof of their issue in fee;

and to anticipate payment of one-half of each child's provision.

and apply the rents, interest, and other produce and income of my means and estate, after providing for the payment of the annuities hereinbefore provided, prospectively falling to each of my children, or such part thereof as my said trustees may deem necessary and proper for the maintenance, clothing, education, upbringing, and advantage of the said children respectively until actual payment of their shares: And I provide that the sum to be so allotted for the maintenance, clothing, education, and upbringing of my said children may include a suitable board for them, to be paid to my said wife while they live in family with her: AND TO PREVENT DOUBTS, it is declared that the shares of succession effecting to my said children shall become vested interests in their persons at and only upon the arrival of the period of payment above mentioned: AND NOTWITHSTANDING the period for the payment of the shares of residue before expressed, I provide that it shall be lawful to and in the power and option of my trustees, if they see cause and deem it fit, to postpone the payment of the provisions aforesaid in the case of all or any of my children beyond the said term of payment, and to apply the interest or other annual produce of the same, during such interval, to and for behoof of such child or children, or by a deed under their hands to retain the said provisions or any of them vested in their own persons; OR TO VEST the same in the persons of other trustees, whom they are hereby authorized to appoint, with all or any of the powers, privileges, and exemptions conferred on themselves, including the nomination of a quorum, and the power of appointing factors and assuming other trustees, so that my children or any of them, as the case may be, may draw and receive only the interest or other annual proceeds of their respective provisions during their lives, or for such time as my said trustees may fix; and that the capital may be settled on or for behoof of such child or children, and their lawful issue, on such conditions, and under such restrictions and limitations, and for such uses as my trustees may in their discretion deem most expedient, of which expediency, and the time and manner of exercising the powers and option hereby given, they shall be the sole and final judges: AND ALSO, that it shall be lawful to and in the power and option of my trustees, if they shall so think fit, to advance and pay before the arrival of the term of payment foresaid, to and for behoof of my

children or any of them, any part not exceeding one-half of the fee or capital of the provisions hereby made in his or her favour, for establishing a son in business, or fitting out a daughter on marriage, or otherwise for the behoof of my children : **AND I PROVIDE and DECLARE** that all sums advanced or which may be advanced by me in loan to my said children or any of them [which may be debited to them in my books or in any memorandum or writing left by me, or] for which vouchers may be held by me at my death, and all sums which may be chargeable and charged against my estate in respect of any obligations which I have come under, or may come under, for any of my said children, shall be debts due to my estate, and deducted from the provisions hereby made in their favour, or of those succeeding to them respectively ; but no interest which may be due up to the date of my decease upon any such advances shall be charged against my said children or their foresaids : **DECLARING** that the whole provisions hereby made, in so far as in favour of or descending upon females, shall be expressly exclusive of the *jus mariti* and right of administration of any husbands they have married or may marry, and shall not be affectable by the debts or deeds of such husbands, or any diligence or execution competent to follow thereon : **AND I PROVIDE and DECLARE** that the acceptance of the foresaid provisions in favour of my said children shall be deemed and taken to be in satisfaction to them of legitim, and executry, and of all claims legally competent to them upon my decease : **AND I PROVIDE** that my said trustees and executors shall be entitled to the fullest powers and exemptions usually conferred in similar cases according to the most liberal interpretation ; and particularly, I **AUTHORIZE and EMPOWER** them to submit to arbitration, or settle by the advice of counsel, all disputed claims competent to or against the said trust subjects and estate, or among the parties interested therein ; **TO COMPOUND** and take part for the whole of any disputed debts or claims ; **TO LEND** out the whole or any part of the trust funds and estate on heritable security, or the debentures of incorporated companies, or on the security of the Government funds, or of shares in chartered or incorporated companies in Great Britain ; or to invest the same in the Government funds, or in the purchase of heritable property, feu duties, ground-annuals, or other heritages, or of the guaranteed or preference or

Advances by testator to be charged against children's provisions.

Exclusion of *jus mariti*.

Provisions to be in satisfaction of legitim.

Powers of administration defined and enlarged.

Arbitration.

Power to compound. Investment.

Appointment
of factors and
agents.

Indemnity
clauses.
Indemnity for
investments;

for construc-
tive intromis-
sion;

for omissions
and negli-
gence.

debenture stock of railway or other incorporated companies in which the liability of each shareholder is limited to the value of the stock held by himself, or to retain the same in bank in Great Britain; and from time to time to alter and renew the securities as may be necessary, or may seem to them expedient; TO SECURE the annuities herein-before provided by purchasing life annuities from an insurance company, or from any other party or parties, and upon such security as they may think expedient; TO APPOINT any one or more of their own number, or any other proper person or persons, to be factor or factors, or law agent or law agents, under them for the management of the trust estate, and to allow such factors suitable remuneration for their trouble, and such law agents the usual professional fees; but for the intromissions of such factors they shall not be liable, provided the party or parties so appointed were reputed solvent at the time, and had given security; but for the sufficiency of which security they shall not be liable further than that it was reputed sufficient at the time: AND I PROVIDE and DECLARE that the said trustees shall not be liable for the sufficiency of the securities on which they may lend out the trust funds, or of the banks in which the same may be deposited, but only that they were reputed sufficient at the time; nor shall they be responsible that the properties, feu duties, ground-annuities, stock, and others which they may purchase with the trust funds in terms of the powers hereby conferred, or any part thereof, shall realize the price or prices at which the same were purchased. [*If it is wished to indemnify the trustees against the consequences of constructive intromissions, add:—* AND I DECLARE that each of the said trustees shall be liable to account only for the funds actually received by himself, and not for any funds which he may have authorized a co-trustee, factor, or agent to receive; and that any trustee who shall pay over to a co-trustee, factor, or agent, or shall do or concur in any act enabling such co-trustee, factor, or agent, to receive any monies for the general purposes of the trust, or for any definite purpose authorized by this settlement, shall not be responsible for any loss resulting from his failure to see to the due application of the fund entrusted to such co-trustee, factor, or agent.] [*If it is wished to give immunity for omissions, add:—* AND NONE of my trustees shall be RESPONSIBLE for the failure to recover any debt or fund, the

realization of which has been by him entrusted to and undertaken by a co-trustee, factor, or agent to the trust.] And in order to prevent the failure of the discretionary powers hereby conferred in consequence of the office of trustee lapsing, I request my trustees, as soon as their number is by resignation or otherwise reduced below three, to assume other trustees with the same powers as are hereby conferred on themselves : AND I RESERVE my own *liferent* use and enjoyment of the whole premises, and full power and liberty at any time during my life, and even on death-bed, to revoke, burden, qualify, explain, or in any way to alter these presents at pleasure ; DISPENSING with the delivery hereof, and DECLARING that the same, so far as unaltered, though found lying by me or in the custody of any person undelivered at my decease, shall have the full effect of a delivered evident, any law or custom to the contrary notwithstanding ; AND I CONSENT to the registration hereof for preservation. —In witness whereof, etc.

Reservation of
liferent.

Delivery

No. V.—*Abridged Form of Settlement of whole Estate in trust for Testator's Daughter or Widow in alimentary Liferent, with power of Disposal as to part.—Fee to her Family ; vesting at majority or marriage, and after expiry of liferent.—Power to Children to apportion shares prospectively falling to their Families.—Powers of advancement and anticipation.—Destination over to Appointees or Heirs of Liferentrix.*

I, A. B. of X., with the view of settling my affairs, and providing for the disposal of my means and estate after my decease, and for other good causes and considerations, DO hereby GIVE, GRANT, DISPONE, ASSIGN, CONVEY, and MAKE OVER to and in favour of C. D., E. F., and G. H., and to their legal successors in office [it is now settled that a trust descends to acceptors and survivors, and the provision of a quorum and power of assumption are conferred by statute ; but if wished, the form of destination in No. IV. may be used], and to the heirs of the longest liver of them, as trustees and trustee for the ends, uses, and purposes after mentioned, and to the assignees of the said trustees or their foresaids, all my estate, heritable and moveable, real and personal, owing and belonging to me at my decease, with the rents, interest, profits, and pro-

Disposition to
trustees.

Appointment of executors.	duce, and writs, titles, and vouchers thereof; AND further, I
Declaration of trust,	NOMINATE and APPOINT the said trustees and their foresaids to
and authority to realize and sell.	be my sole executors and executor; BUT THESE PRESENTS are granted and are to be accepted by my said trustees and their fore- saids in trust, with the powers and privileges, and for the ends, uses, and purposes following, viz.: THAT THEY MAY, as they are hereby authorized and empowered to do, call, sue for, uplift, receive, assign, and discharge the whole debts and effects due and belonging to me, and sell, realize, and convert into money the whole of my estates and effects, and sell and dispose of my heritable estate by public roup or private bargain, and for such price or other consi- deration as they might think fit, but the time, and manner, and propriety of selling my heritable property shall be entirely at the discretion of my said trustees; DECLARING that the debtors to my estate, or the purchasers thereof, or other parties with whom my trustees shall transact, shall have no concern or right to interfere with the application of the sums paid to my said trustees, whose receipts shall be sufficient exoneration for the same; AND my said trustees shall apply, as they are hereby AUTHORIZED, DIRECTED, and EMPOWERED to apply, my said estates and the produce thereof in manner following, viz.: IN THE FIRST PLACE, in payment of all my just and lawful debts, sick-bed and funeral charges, and also of the expenses of this trust, which debts, expenses, and others my said trustees may pay without requiring legal constitution: IN THE SECOND PLACE, my said trustees and executors shall pay over to E. B. or D., my daughter [<i>some of the clauses of this form are peculiarly adapted to the case of a liferent destination to the testator's widow</i>], the whole annual produce and rents of the residue and remainder of my means and estate during all the days and years of her life; DECLAR- ING that it shall be lawful to and in the power of my said trustees and executors to pay to the said E. B. or D., from time to time as they may think fit, such portions or the whole of the principal of my said means and estate as they may think fit; WHICH PROVISIONS above made in her favour shall be held and applied as an alimentary provision for behoof of herself and any child or children she may have, as long as such child or children continue to reside in family with her, and shall not be affectable by her debts or deeds, or attachable by the diligence of her creditors; AND I GRANT power
Trustees em- powered to grant valid discharges.	
Purposes of trust. 1. Payment of debts and ex- penses. 2. Liferent of whole estate to testator's daughter.	
Trustees au- thorized to make advances from the capi- tal.	
Liferent declared ali- mentary.	

to the said E. B. or D. to test upon and dispose of the principal sum of L.1000 sterling, part of the said residue, or any part of the said principal sum of L.1000, by any *mortis causa* deed to be executed by her, and to take effect after her death, and that to and in favour of such persons or person as she may appoint, to whom my said trustees are authorized to make payment accordingly; and failing such disposal, the said sum shall be applied as is herein directed with respect to my residuary estate: **IN THE THIRD PLACE**, I direct my said trustees and their foresaids, on the death of the said E. B. or D., to hold and apply, pay, divide, and convey the whole rest, residue, and remainder of my means and estate, heritable and moveable, real and personal, and the produce thereof, which may be then remaining, excepting such part thereof as the said E. B. or D. may dispose of in virtue of the foresaid power, to and for behoof of the lawful child or children of the said E. B. or D., payable in such proportions, at such terms, on such conditions, and under such restrictions as she may direct by any writing under her hand; and failing any such writing, then to the surviving children of the said E. B. or D. equally, the issue of any predeceasing child being entitled to the interest which the parent would have taken as a surviving legatee, payable to them in the case of sons on their respectively attaining to the years of majority, or in the case of daughters on their respectively attaining to the years of majority or being married, whichever of these events shall first happen; **AND I DECLARE** that the interests of my legatees and their foresaids shall vest in them respectively at and only upon the arrival of the terms at which their shares of my succession respectively become payable; **BUT** any of the children of my said daughter, upon attaining to majority, and during the lifetime of their mother, shall have power to divide and apportion his or her prospective interest, or the interest of his or her family, among his or her children and their issue, in such proportions and subject to such conditions as he or she may think proper. [*The vesting clause may be varied so as to make the interest vest at majority or marriage notwithstanding the subsistence of the life-rent right; in which case the power of division will of course be omitted.*] **AND I DIRECT** my said trustees to hold and apply the rents, interest, and other produce and income of my means and estate prospectively falling to each of the said children of the said E. B. or D., or

Power of disposal of part of fee granted to life-renter.

3. Fee settled upon life-renter's children and their issue.

Power of division granted to life-renter.

Fee to vest at majority, etc., and after expiry of life-rent.

Power of division granted to prospective heirs.

Application of income during minorities.

Power to anticipate payment.

4. Destination over to appointees of life-rentrix;

and in default of appointment, to her heirs.

such part thereof as my said trustees may deem necessary and proper for the maintenance, clothing, education, upbringing, and advantage of the said children respectively, until actual payment of their shares; AND NOTWITHSTANDING the period for the payment of the shares of residue before expressed, I provide that it shall be lawful to and in the power and option of my trustees, if they shall so think fit, to advance and pay, before the arrival of the term of payment foresaid, to and for behoof of the said children of the said E. B. or D., or any of them, the whole or any part of the fee or capital of the provisions hereby made in their favour, for their support, or for establishing a son in business, or fitting out a daughter on marriage, or otherwise for behoof of the said children: AND IN THE LAST PLACE, in the event of the failure of lawful children of the said E. B. or D., and of their issue, I direct my said trustees, on her death, or on such failure, whichever shall last happen, to hold and apply, pay, divide, and convey the whole rest, residue, and remainder of my said means and estate, heritable and moveable, real and personal, and the produce thereof, or the portion thereof then remaining, to and for behoof of such person or persons, payable in such proportions, at such terms, and on such conditions, and under such restrictions as the said E. B. or D. may appoint by any writing under her hand; AND FAILING any such writing, then to and for behoof of her nearest lawful heirs whomsoever: AND I PROVIDE [as in Style No. 4].

No. VI.—*Settlement of a Merchant or Manufacturer, empowering Trustees to carry on Testator's business.—Eldest Son, and afterwards second Son, to have the powers of Managing Partners, and to receive share of profits.—Residuary interest to vest in whole Family after the youngest Child attains majority.—Provisions as to ultimate transfer of business to Sons at a valuation, in the Trustees' discretion.*

Disposition to trustees.

I, A. B. of X., being desirous to settle during my life the succession to my subjects and estate, do hereby GIVE, GRANT, ASSIGN, and DISPONE to and in favour of

and to such other person or persons as may be hereafter nominated

and appointed by me, or as may be lawfully assumed into the trust in virtue of the powers to that effect after mentioned, and to the acceptors and survivors and the acceptor and survivor of them, and the heirs of the longest liver of them, as trustees and trustee, for the ends, uses, and purposes after mentioned, DECLARING the major number of them surviving and accepting the office of trustee from time to time (although not accepting that of executor), and resident in Great Britain, to be a quorum, All and Sundry lands, tenements, tacks, heritages, and also All and Sundry goods, debts, effects, sums of money, and stock-in-trade, and in general the whole means and estate, heritable and moveable, real and personal, owing and belonging, or that shall be owing and belonging to me at my death, or of which I may have the power of disposal, with the whole rents, interest, and produce, and writings, vouchers, and securities thereof: AND I hereby NOMINATE and APPOINT the said

Appointment
of executors.

and any other person or persons who may be nominated and appointed, or may be assumed as aforesaid, and the acceptors and survivors and acceptor and survivor of them and their foresaids, to be my sole executors and executor, and universal intromitters and intromitter with my whole moveable or personal estate, with power to give up inventories thereof, confirm the same if needful, and in general to do everything else which to the office of executor belongs: DECLARING that these presents are granted, and the said subjects, heritable and moveable, are disposed and conveyed to the said trustees in trust, for the ends, uses, and purposes, and with the powers after mentioned, viz.: IN THE FIRST PLACE, my said trustees and executors shall make payment of my whole just and lawful debts, of my sick-bed and funeral charges, and of the expenses of the trust and executorship hereby committed to them, which debts I authorize my said trustees to pay on their own conviction of the same being justly due without the necessity of legal constitution: IN THE SECOND PLACE, the said trustees and their foresaids shall transfer and deliver to C. D. or B., my spouse, the whole household furniture and plenishing, beds, table linen, books, paintings, engravings, wines and other liquors, and generally the whole household plenishing and effects that may belong to me at my decease: IN THE THIRD PLACE, as it is my wish that my business of a brewer, presently carried on by me in Y. Street, upon the heritable subjects there,

Declaration of
trust, and pur-
poses.

1. Payment of
debts and ex-
penses.

2. Legacy of
furniture, etc.,
to testator's
widow.

3. Trustees to
permit busi-
ness to be car-
ried on by tes-
tator's sons,

who shall
account to the
trustees.

• Salary and
share of profits
payable to tes-
tator's sons.

Net profits to
be paid over to
the trustees
for certain
subsidiary
purposes.

belonging to me, shall be preserved and carried on for behoof of my family, I hereby request and authorize my said trustees and executors to allow the same to be carried on for such length of time as they may consider advisable, under the management of my eldest son, so long as he shall conduct the said business to the satisfaction of my said trustees and executors; and if and when my second son shall attain the age of twenty years, I request and direct that he shall be conjoined with his elder brother in the management of the said business, if my said trustees shall think such a step proper; and the business shall thereafter be carried on by my said sons, and the survivor of them; **DECLARING** that so long as the said business shall be so carried on by my said son or sons, or the survivor of them, the same shall be carried on under the firm of A. B. & Co., and my said son or sons, or the survivor of them, shall be entitled to sign, on behalf of the said firm, all documents and writings necessary for the proper conducting of the business, and my said son or sons shall keep regular and distinct books, showing the whole transactions of the business, which shall at all times be open and patent to the said trustees, and the said books shall be brought to a balance upon the 31st day of January annually, and a copy of the balance sheet furnished to the said trustees without delay; declaring that so long as the said business is carried on upon the said premises, the same shall be debited and charged with such rent therefor as my said trustees may from time to time consider fair and adequate: **AND FURTHER DECLARING**, that so long as the said business is so carried on, my eldest son shall be entitled to a salary of L. per annum, payable quarterly, and also to one fourth part of the nett annual profits of the business, after deducting rent as aforesaid and interest on the capital forming part of my trust estate embarked in the business, as the same may appear from the balances to be made as aforesaid, in remuneration for his time and trouble in managing said business, and if and after my second son is conjoined in the management of the business, he shall also receive one fourth part of the nett annual profits of the business, as the same may appear as aforesaid: **AND FURTHER DECLARING** that the remainder of the profits of the said business shall be under the control and management of and paid over to the said trustees, who shall apply the same, and the annual proceeds of the residue and remainder of my means and

estate, as follows, viz.: **FIRST**, they shall make payment to the said Mrs C. D. or B. of an annuity, additional to the annuity secured to her by our contract of marriage, of L. sterling yearly, free from all deductions, duties, and taxes, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the first of these terms that shall occur after my decease for the half year succeeding, with interest at the rate of five pounds per centum per annum, from the terms at which the same respectively become due until paid; and which annuity to my said spouse shall be payable, and I accordingly direct my said trustees to make payment of the same, to her out of the fee of my said estate, if the annual income and produce thereof shall not be sufficient for that purpose: **SECOND**, they shall from the said annual profits and the said annual proceeds pay or apply the sum of L. sterling annually, or such other sum as my said trustees may consider adequate and proper in the circumstances of my family, to or for behoof of each of my children who may be in minority at my decease until they shall respectively attain the age of 21 years complete, for their maintenance, education, and upbringing; and which annual payments may, in the discretion of the said trustees, be paid to the said Mrs C. D. or B. for behoof of the said children: **THIRD**, they shall from the said annual profits and the said annual proceeds make payment of an annuity of L. to E. B., my sister, yearly, free from all duties, deductions, and taxes, payable at the terms, and commencing to be payable at the term, before provided in regard to the annuity in favour of my said spouse; and which annuity, like that in favour of my said spouse, shall be payable out of the fee of my estate should the annual income and produce thereof not be sufficient for that purpose: **AND FOURTH**, so much of the balance of the said nett annual profits and of the said annual proceeds as may by my said trustees be considered advisable, shall, if my said trustees in their sole discretion think proper, from year to year be added to the capital of the said business, and employed in extending the same; **DECLARING** that at the 31st day of January succeeding the attainment of majority by all my surviving children, or their marriage if daughters, the said trustees may allow my said eldest son and second son, or the survivor of them, to acquire the said

(1.) For payment of annuity to testator's widow.

(2.) Provision for the maintenance of testator's children.

(3.) Annuity to testator's sister.

(4.) Surplus may be employed in extending the business.

Provision for sale of business to testator's two elder sons, on arrival of youngest child at majority, etc.

business, and the whole stock-in-trade and assets effeiring thereto, and debts due to the same, and also the heritable subjects belonging to me in which the said business is carried on, if the same shall then be carried on in the same premises, at such price as may be mutually agreed upon between my said trustees on the one hand, and my said sons or the survivor of them on the other, which failing, at such price as may be put thereon by two arbiters, one whereof shall be named by my said trustees and their foresaids, and the other by my said sons or the survivor of them, with power to the said arbiters to name an oversman in the event of their differing in opinion. *[If it is wished that other members of the family should be interested in the business, the following provision may be made :*

Younger children may be permitted to retain an interest in the concern.

PROVIDED ALWAYS, that if any of my other children prefer to retain his or her interest in the said business, they shall be at liberty to do so, but shall not be bound to assist in the management of the business; and my trustees shall in that event assign and specifically convey to such child such share of the said business as he or she may be entitled to in virtue of the final purpose of this my settlement; reserving to my said two sons and the survivor of them the same fixed salary, and the same share of profits in remuneration for their management of the business, as is herein-before provided to them, for which sums and shares they or he shall accordingly be entitled to take credit in accounting with such of my other children as may choose to retain their interest in the business.]

Business may be wound up.

DECLARING, that in the event of both of my said sons deceasing before the period above mentioned, the said business shall upon the death of the survivor be disposed of and wound up; BUT PROVIDING always, and DECLARING, that it shall be in the power of my said trustees and their foresaids, if they shall think it expedient and judicious, of which they shall be the sole and exclusive judges, either to sell the said business to my said sons or the survivor of them at an earlier period than is before provided, or they may have the said business wound up and brought to an end, the stock, assets, and good-will disposed of, and the debts and liabilities paid, at any time (even before the expiry of the foresaid period) which they may think proper; AND IN THE EVENT of the said trustees exercising the said power, or of the said business being wound up before the period before mentioned, the foresaid annuities to my said wife and

Trustees may anticipate the term appointed for selling or winding up the business;

in which case, annuities to be charged on General Estate and Mainte-

sister, and the foresaid annual payments to each of my said children, shall be paid as follows: The said annuities out of my general estate, and the said annual payments from the annual income and produce of the shares of my estate hereinafter provided in favour of my children respectively: AND IN THE LAST PLACE, after all my surviving sons shall have attained the age of majority, and my surviving daughters shall either have attained the age of majority or have been married, my said trustees and their foresaids shall pay or convey the whole residue and remainder of my means and estate, including the sums which may be paid by my said sons or realized by my said trustees in respect of the said business (or the property of the said business itself, in the event of any of my children electing to take a specific conveyance of their proportional share thereof), and the annual income and produce thereof, to and for behoof of my whole surviving children, and the issue of any children who may have predeceased, in equal shares (the division being *per stirpes*); IT BEING MY INTENTION, that the shares of the residue and remainder of my estate divisible as aforesaid shall become vested interests in the persons of any of my children, or of the issue of any of my children, at and only upon the period of distribution above specified. [Insert declaratory powers and formal clauses as in Style No IV., including such of the special powers embodied in the introductory purpose of that style as may be deemed requisite.]—In witness whereof, etc.

ance of children on their respective Provisions.

Residuary destination to surviving children and their issue on youngest child attaining majority.

Interests of testator's children to vest at the period of distribution.

No. VII.—*Settlement of a landed Proprietor having interests in Mines, etc.—Destination of Heritable Estate to eldest Son and his Heirs, under reservation of minerals for twenty-one years. Portions of that Estate, and certain manufacturing subjects, to second Son.—Power of Division under Marriage-Contract exercised.—Produce of minerals during twenty-one years to be added to residuary fund; division in unequal proportions amongst Sons and Daughters and their Issue.—Interests to vest a morte testatoris.*

I, A. B., Esquire of X., with the view of settling my affairs after my decease, and for other good causes and considerations me hereto moving, DO hereby GIVE, GRANT, ASSIGN, DISPONE, CONVEY, and MAKE OVER to and in favour of

Conveyance to trustees.

, and any other person or persons

who may be hereafter nominated by me, or lawfully assumed into the trust, and the acceptors and survivors and acceptor and survivor of them, the major number of them accepting and surviving, and resident in Great Britain, from time to time, being a quorum, and to the heirs of the longest liver of them, as trustees and trustee for the ends, uses, and purposes after mentioned, and to the onerous assignees of the said trustees and their foresaids, All and Sundry lands, tenements, heritages, goods, gear, debts, effects, and sums of money, and in general the whole means and estate, heritable and moveable, which shall be owing and belonging to me at my decease, with the rents, interest, and produce, and the writings, titles, and vouchers of the premises: AND further, I do hereby NOMINATE and APPOINT the said trustees and their foresaids to be my only executors and executor, and universal intromitters and intromitter with my personal means and estate, with full power to give up inventories thereof, and confirm the same at pleasure, and generally to do everything pertaining to the office of executor: BUT THESE PRESENTS are granted and are to be accepted by my said trustees and their foresaids in trust for the ends, uses, and purposes, and with the powers and privileges, following, viz.: THAT THEY MAY, as they are hereby authorized and empowered to do, call, sue for, realize, uplift, receive, assign, and discharge the whole means and estate which may belong to me at my decease; WITH POWER to sell and dispose of my heritable estate, except in so far as the same may be disposed and conveyed in favour of my children in pursuance of the provisions hereinafter made in their favour respectively, and that by public roup or private bargain, and for such price, feu duty, ground-annual, or other consideration as they may think proper, and to grant, execute, and deliver all deeds and writings necessary for carrying into effect the purposes of the trust, binding my estate in absolute warrandice: AND I PROVIDE and DECLARE that all parties dealing and transacting with my said trustees shall have no concern with, or right to inquire into, the application and management of my means and estate, but that the receipt of my said trustees shall be sufficient exoneration: AND I further PROVIDE and DECLARE that any one or more of my trustees, or the beneficiaries under these presents, shall be entitled to become purchasers of my estate or any part thereof, any law or custom to the contrary notwithstanding:

Appointment
of executors.

Declaration of
trust, and grant
of special
powers.

Power to real-
ize;

power of sale.

Trustees em-
powered to
grant valid
discharges.

Trustees and
beneficiaries
empowered to
become Pur-
chasers of the
trust estate.

AND my said trustees shall HOLD and APPLY my means and estate, and the proceeds and produce thereof, as follows, viz.: IN THE FIRST PLACE, in payment of all my just and lawful debts, sick-bed and funeral charges, and of the expenses of executing this trust, which debts, charges, and expenses my said trustees may pay without requiring legal constitution: IN THE SECOND PLACE, in payment of a free liferent annuity of L. sterling to C. D., my sister, free of legacy duty, during all the days and years of her life after my decease, payable at such periods as she may require the same. [*In this form the testator is supposed to be a widower. In other cases an annuity additional to her jointure may be given to the testator's widow, and also a provision of furniture, etc.*] IN THE THIRD PLACE, my said trustees shall deliver over to my children in as nearly equal shares as practicable, and in such way and manner as they may agree upon among themselves, according to their own taste and judgment, which failing, as my said trustees may deem best and most fitting, my whole plate, paintings, books, napery, household furniture and effects, so far as not hereinafter bequeathed to my son E. B., or the party succeeding to him under the fifth purpose hereof; and in the event of any of my children predeceasing me, their children shall succeed equally among them to their parents' share: IN THE FOURTH PLACE, in payment to each of my daughters, J. B., and Mrs M. B. or N., of a legacy of L. sterling, in addition to the provisions hereinafter made in their favour, payable at the first term of Whitsunday or Martinmas occurring six months after my decease, with interest at the rate of five pounds per centum per annum from that term until paid; and in the event of either of my said daughters predeceasing me, leaving children, such children, and the survivors or survivor of them, shall be entitled equally among them to the legacy provided to their parent, the issue of any of the children of my said daughters who may have deceased leaving issue being entitled to the share to which their parent would have been entitled if in life; and also, in payment of such other legacies or donations as I may bequeath by any signed codicil or informal writing under my hand, expressive of my intention: IN THE FIFTH PLACE, my said trustees shall, as soon as convenient after my decease, dispoise, convey, and make over to my eldest son, E. B., those portions of my lands and estate of Southfield and

Purposes of the trust.

1. Payment of debts and expenses.

2. Annuity to testator's sister.

3. Division of plate and household effects amongst testator's children.

4. Legacy to each of testator's daughters.

5. Specific destination of heritable estate to the testator's eldest son;

others, marked on the plan endorsed hereon, and signed by me as relative hereto, by the following numbers, viz., one, two, three, four, and five, and coloured green upon the said plan, being the whole of my lands and estate of Southfield and others, except those portions thereof hereinafter especially directed to be conveyed to the parties after named, with the parts, pendicles, privileges, and pertinents thereof, and whole rights pertaining thereto, and whole buildings and erections thereon; UNDER BURDEN of the feu rights of such portions thereof as may have been feued out and disposed by me, in so far as the same have not been or may not be re-acquired by me, with the rents and feu duties falling due in respect thereof, from the first term of Whitsunday or Martinmas after my decease; and

under burden of feu rights,

and also certain fixtures and furniture.

also the whole fixtures, window-curtains, grates, blinds, and other articles of standing furniture fitted for and in use in the mansion-house of Southfield at my death, and which my said trustees shall have power to settle and point out in case of dispute; AND IN THE EVENT of the said E. B. predeceasing me, then the said trustees and their foresaids shall dispoise, convey, and make over the said lands and others, under the reservation before referred to, with the pertinents, rights, and others, and rents as aforesaid, to the nearest heir-male of the body of the said E. B., and failing heirs-male of his body, the said lands shall form part of my residuary estate; SUBJECT the said eventual disposition in favour of the heir-male of the said E. B. to the payment, and with and under the real lien and burden, of the sum of L. sterling, which shall be payable by such heir-male to my said trustees and their foresaids at the first term of Whitsunday or Martinmas occurring six months after my decease, with interest thereon at the rate of five pounds per centum per annum from that term until paid; WHICH SUM of L.10,000 shall be held and applied by the said trustees and their foresaids for behoof of the issue of the said E. B. surviving me, other than the heir succeeding to the said estates, equally among them *per stirpes*, payable to sons upon their respectively attaining to majority, and to daughters upon their respectively attaining to majority or being married, whichever of these events shall first happen; and the annual income and interest of the share prospectively falling to each child or descendant of the said E. B. shall be paid to his or her legal guardian for the

Conditional institution of heirs-male of the body of the beneficiary.

Beneficiary's heir-male burdened with payment of a provision to younger children.

Destination of younger children's provision.

purpose of being applied towards his or her maintenance, education, and upbringing until the foresaid period of payment: IN THE SIXTH PLACE, my said trustees shall, as soon as convenient after my death, dispoſe, convey, and make over to my ſon, the ſaid G. H. B., thoſe portions of my lands marked on the ſaid plan by the following numbers, viz., ſix, ſeven, and eight, and coloured blue on the ſaid plan, but under the ſame reſervations expreſſed in relation to the lands appropriated under the fifth purpoſe hereof, and alſo the whole heritable ſubjects belonging to me ſituated at St David's, in the pariſh of _____, together with the whole parts, pendicles, and pertinents thereof, and whole rights pertaining thereto, AND the whole buildings, erections, and machinery, heritable and moveable, thereon, and the rents to become due in reſpect thereof, from and after the firſt term of Whitsunday or Martinmas after my deceaſe: AND I do hereby PROVIDE and DECLARE, that in the event of the ſaid G. H. B. predeceasing me, leaving iſſue ſurviving me, my ſaid trustees may either diſpoſe and convey the lands and others before provided in his favour to and equally among his lawful children who may be alive at my deceaſe, and the iſſue of any of them who may have predeceased leaving children, ſuch iſſue ſucceeding equally and proportionally to their parent's ſhare, or they may retain the ſaid lands and others for ſuch period as they may judge proper, and apply the annual income and produce thereof to and for behoof of the parties in whom the ſaid eſtates will by the terms of the foregoing deſtination veſt at my deceaſe, or their heirs and aſſignees; AND MAY SELL and diſpoſe of the ſaid lands and others, under the reſervations before referred to in the fifth and ſixth purpoſes hereof, in virtue of the powers before conferred, if and when they think proper, and divide the prices and proceeds thereof among the parties entitled thereto as aforeſaid, and failing my ſaid ſon, G. H. B., without leaving iſſue ſurviving me, then the portion of my lands and others deſtined to his family ſhall revert to and form part of my reſiduary eſtate: IN THE SEVENTH PLACE, I do hereby expreſſly PROVIDE and DECLARE that the diſpoſitions and conveyances of my lands of Southfield and others, excluſive of my ſubjects at St David's, to be granted in favour of my children and their foreſaids in manner foreſaid, ſhall be granted ſubject to the reſervation in favour of my ſaid trustees and their

6. Specific deſtination of certain parts of the heritable eſtate to ſecond ſon;

with buildings and machinery, etc.

Conditional inſtitution of ſecond ſon's children and their iſſue.

Discretionary truſt to ſell for behoof of his family.

7. (Exceptions from prior deſtination.) Reſervation of minerals for the term of 21 years.

foresaids of the whole coal, metals, and minerals situated in and under my said lands of Southfield and others, and all the parts thereof, for the period of twenty-one years from and after the date of my decease; and the said trustees shall hold and possess the same for the said period, in terms, with the powers, and for the objects expressed in the last purpose hereof, hereinafter written; AND upon the expiry of the said period, I provide and declare that the said coal, metals, and minerals, so far as then unwrought, shall become and be the property of the party or parties under whose lands the same are situated, and my said trustees shall, if required, execute conveyances thereof to the parties respectively entitled thereto;

After the elapse of 21 years, mineral property to accrete to the lands.

AND IN RESPECT that certain portions of the foresaid lands of Southfield and others are burdened with an heritable debt for the sum of L. , I provide and declare that the said debt, or such part thereof as may be remaining unpaid at my decease, with the interest thereon, shall be wholly payable from those portions of my said lands destined to the said E. B. and his foresaids, and shall be created real liens and burdens thereon in the dispositions which may be executed thereof, so that the remainder of the said lands may be wholly freed and relieved of the same; AND I further PROVIDE and DECLARE that the foresaid subjects and others at St David's, directed to be conveyed to the said G. H. B. and his foresaids, shall be so conveyed under burden and subject to any heritable securities which may affect the same at my death; AND I DESIRE that my said trustees shall hold the whole coals, metals, and minerals situated in and under my said lands of Southfield and others for and during the foresaid period of twenty-one years from and after my decease; AND should the same not be let at the period of my decease, I request my said trustees to let the same as soon thereafter as may be practicable, and that for such fixed rent, lordship, or other consideration, and for such period, and generally on such terms, as they may in their discretion consider proper; And I declare and provide, that in letting the said coals, metals, and minerals, the said trustees shall have the most full and ample discretion as to the mode and terms upon which the same shall be let and wrought; AND PARTICULARLY, without prejudice to the said generality, I provide and declare that they shall have power to confer upon the tenants liberty to sink pits and erect engines, store and bin coals,

Heritable debts secured on principal estate to be payable therefrom.

Idem, as to estate destined to second son.

Trustees to accumulate produce of mineral estate;

with power to lease;

and to enter into collateral contracts with the tenants for working, etc.;

calcine ironstone and burn lime, and generally to make all erections and perform every operation requisite or desirable in working, winning, and preparing the said coal, metals, and minerals, and that upon any part of the said lands belonging to me which may be found to be most convenient for all or any of the said purposes, the tenants being always taken bound to compensate the proprietor and tenant of the surface for whatever damage may be done to the surface of the said lands and the buildings thereon by their operations or erections made thereupon; AND I further provide and declare that the said trustees shall in their discretion be entitled, if they consider that a greater return may be derived from the said coals, metals, and minerals, to let those in certain portions of the said lands in preference to others, or to authorize or take the tenants bound to work the said coals, metals, and minerals under certain portions of the said lands in preference to others, my desire being that as large a sum as practicable shall be derived from the said coals, metals, and minerals within the foresaid period; AND I RECOMMEND my said trustees, in letting the said coals, metals, and minerals, to see that proper stipulations are made with the tenants against working within a safe distance of houses and buildings; and I also recommend them to introduce clauses for prohibiting working under such portions of the said lands destined to my said sons as may be immediately available for feuing purposes: IN THE EIGHTH PLACE, whereas by the contract of marriage entered into between me and Mrs E. L. or B., my spouse, there is reserved to me a power of dividing and apportioning the fund thereby provided to the children of the marriage and their issue, in such manner, and subject to such conditions with respect to the term of payment, and otherwise, as I should direct, I hereby apportion and divide the said fund into six equal shares, and appoint the same to be paid and applied by the trustees of the said contract of marriage in the proportions, to the persons, in the manner, and at the times specified in the last purpose of this my settlement, it being my intention that the fund provided to the children of the marriage and their issue as aforesaid shall be dealt with as part of my residuary estate: AND IN THE LAST PLACE, I direct and appoint my said trustees to hold the whole residue and remainder of my means and estate, heritable and moveable, with the prices and produce thereof, and to

and to bind the tenants to exhaust certain portions.

Provisions against working near houses, etc.

8. Execution of power of division reserved to testator by marriage-contract.

Residuary destination (including produce of mineral estate) to

testator's children in unequal proportions.

Conditional institution of issue. Equal division of lapsed shares among surviving children and issue of predeceasing children.

Interests in the testator's whole succession to vest at his decease.

convey or divide and pay over the same, and also to divide and apportion annually, the rents, lordship, and income derived from the said coals, metals, and minerals, into six equal parts or shares, and to make payment of two of the said parts or shares to each of my said sons, and of one of the said parts or shares to each of my daughters, J. B., and Mrs M. B. or N.; AND in the event of any of my said children predeceasing me leaving issue, such issue shall succeed equally among them to their parent's share; and in the event of the decease of any of them without leaving lawful issue, or in the event of such issue existing but predeceasing me, the share of such deceiver shall fall to and be divided equally among the survivors or survivor of my said children, jointly with the lawful issue of any of them who may have deceased leaving issue, such issue being entitled equally among them *per stirpes* to the share to which their parent would have been entitled if in life; IT BEING MY INTENTION that the right not only to the lands and estates specifically disposed, but also to the residue and remainder of my means and estate, including the prospective interest in the rents, lordships, and annual income of the said coals, metals, and minerals, shall vest at the date of my decease, at which period the conditional institution of survivors throughout this settlement shall take effect notwithstanding the postponement of payment to a later period. [Insert Declarations, Powers, and other formal clauses, as in Style No. IV., or such of them as may be applicable.]

No. VIII.—*Mutual Trust Settlement by Spouses. Destination of Furniture, etc., and also a liferent of the Residue to the surviving Spouse. Fee of Husband's estate to the Family, with destination over to collateral Relatives. Wife's estate, idem. Abridged form of Declarations and Powers, etc.*

We, A. B. of X., and C. D. or B., spouses, with the view of settling the succession to our means and estates after our deaths respectively, and for our mutual love and affection, and other good causes and considerations [*Where the right of revocation is meant to be restricted, say:—In consideration of the provisions herein contained, granted by each of us in favour of the other, and for other good and onerous causes*], Do hereby GIVE, GRANT, ASSIGN, DISPONE, CONVEY,

Disposition to trustees.

and **MAKE OVER**, from and after our respective deaths, to and in favour of

and to any other person or persons whom we may hereafter nominate and appoint by any joint writing under our hands, or who may be lawfully assumed into the trust, and the acceptors and survivors and acceptor and survivor of them, the major number of them accepting and surviving and resident in Great Britain from time to time being a quorum, and to the heirs of the longest liver of them, as trustees and trustee for the ends, uses, and purposes after mentioned, and to the assignees of the said trustees, or their said quorum or their foresaids, All and Sundry lands, tenements, tacks, heritages, debts, goods, gear, effects, and sums of money, shares in trading or other companies, and in general the whole means and estate, heritable and moveable, real and personal, owing and belonging, or which shall be owing and belonging to us respectively at our respective deaths, or of which he or either of us may have the power of disposal, with the rents, interest, profits, and produce, and writings, titles, and vouchers thereof; **AND FURTHER**, we severally **NOMINATE** and **APPOINT** our said trustees and their foresaids to be our sole executors and executor respectively, with full power to give up inventories of our respective personal means and estate, and confirm the same at pleasure, and generally to do everything pertaining to the office of executor; **BUT THESE PRESENTS** are granted, and are to be accepted by our said trustees and their foresaids in trust, with the powers and privileges, and for the ends, uses, and purposes following, viz.:—**THAT THEY MAY**, as they are hereby authorized and empowered to do, call, sue for, uplift, receive, assign, and discharge the whole debts and effects due and belonging to us respectively; **WITH POWER** to sell, realize, and convert into money the whole of our respective estates and effects, and particularly to sell and dispose of our respective heritable estates by public roup or private bargain, and for such price or other consideration as they may think fit; but the time and manner and propriety of selling our heritable property shall be entirely at the discretion of our said trustees; **DECLARING** that the debtors to our respective estates, or the purchasers thereof, or other parties with whom our trustees shall transact, shall have no concern or right to interfere with the appli-

Appointment
of executors.

Declaration of
trust, and grant
of special
powers.

Power to
realize.

Power of sale.

Trustees em-
powered to
grant valid
discharges.

- cation of the sums paid to our said trustees, whose receipts shall be sufficient exoneration for the same ; AND our said trustees SHALL APPLY, as they are hereby authorized and empowered to apply, our said respective estates, and the produce thereof, in manner following, viz. :—IN THE FIRST PLACE, in payment of the just and lawful debts due by us respectively at our respective deaths, sick-bed and funeral charges, and of the expenses of this trust, which debts, expenses, and others our said trustees may pay without requiring legal constitution : IN THE SECOND PLACE, we direct our said trustees and executors to convey and deliver the whole plate and books, and household furniture and plenishing, bed and table linen, china, and whole other household effects which may belong to the first deceiver of us, to the survivor, as the absolute property of such survivor : IN THE THIRD PLACE, in payment to the survivor of us of the whole annualrents, interest, and produce of the residue and remainder of the means and estate of the first deceiver of us ; which liferent provision shall be held and applied by the survivor as an alimentary provision for the support and maintenance of the survivor, and the support, maintenance, and upbringing of the children of our marriage : IN THE FOURTH PLACE, upon the death of the survivor of us, the said trustees and their foresaids shall hold, apply, pay, and convey the whole rest, residue, and remainder of the means and estate of me, the said A. B., to and for behoof of those of my children who shall survive the longest liver of myself and my said spouse, and shall also attain the age of majority, jointly with the issue of any predeceasing child who may be alive on the attainment of majority by my youngest surviving child (the division being *per stirpes*) ; which provisions shall be payable to the said children upon their respectively reaching majority, and to the said issue, or to their legal guardians, on the attainment of majority by my youngest surviving child ; AND the interest and annual income of the share falling prospectively to each child shall be applied towards his or her maintenance and education until the period of payment above mentioned : IN THE FIFTH PLACE, in the event of the failure of issue of the body of me, the said A. B., the said trustees and their foresaids shall pay the whole annualrents, interest, and produce of the said residue and remainder of the means and estate of me, the said A. B., to E. B., my father, during all the days
- Purposes of the trust.
1. Payment of debts and expenses.
2. Provision of furniture, etc., to the survivor.
3. Liferent of residue to the survivor.
4. Destination of residue of husband's estate to his surviving children or issue ; to vest on the arrival of the youngest child at majority.
- Application of interest to the maintenance of the family.
5. Destination over to the husband's collateral relatives.

and years of his life, whom failing, to my mother, Mrs G. H. or B., during all the days and years of her life; and upon the death of my said father and mother, they shall pay and convey the capital and principal thereof equally to and among such of my sisters, J., L., and M., and my brother, N., as may be then alive, jointly with the lawful issue of such as may have predeceased leaving such issue (the division being *per stirpes*):

IN THE SIXTH PLACE, upon the death of the survivor of us, the said trustees and their foresaids shall hold and apply the whole residue and remainder of the means and estate of me, the said C. D. or B., to and for behoof of those of my children who shall survive the longest liver of myself and my said spouse, and shall also attain the age of majority, jointly with the issue of any predeceasing child who may be alive on the attainment of majority by my youngest surviving child (the division being *per stirpes*); which provisions shall be payable to the said children upon their respectively attaining majority, and to the said issue, or to their legal guardians, on the attainment of majority by my youngest surviving child; AND the interest and annual income of the share falling prospectively to each child shall be applied towards his or her maintenance and education until the period of payment above mentioned: IN THE SEVENTH PLACE, in the event of the failure of the issue of the body of me, the said C. D. or B., the said trustees and their foresaids shall pay and convey the capital and principal thereof equally to and among such of my brothers and sisters as may be then alive, jointly with the lawful issue of such as may have predeceased leaving such issue (the division being *per stirpes*): AND we PROVIDE and DECLARE that it shall be lawful to and in the power and option of our said trustees and executors, if they see cause and deem it fit, to postpone the payment of the foresaid provisions of the fee and capital of the residue of our respective means and estates, in the case of all or any of the parties entitled thereto, beyond the term of payment aforesaid, and to apply the interest or other annual produce of the same, during such interval, to and for behoof of the person who but for this provision would have been entitled to the fee thereof, or by a deed under their hands to retain the said provisions, or any of them, vested in their own persons, or to vest the

6. Destination of wife's estate to her surviving children or issue, under same limitations as the husband's

Application of the interest and proceeds.

7. Destination over to wife's collateral relatives.

Power to postpone payment; to restrict beneficiary's interest to a life term; or to create a trust.

same in the persons of other trustees, whom they are hereby authorized to appoint, with all or any of the powers, privileges, and exemptions conferred on themselves, so that the beneficiaries, or any of them, as the case may be, may draw and receive only the interest or other annual proceeds of their respective provisions during their lives, or for such time as our said trustees may fix, and that the capital may be settled upon their children or lawful issue, upon such conditions and under such limitations as our said trustees may think expedient: **AND WE DECLARE** that the whole provisions hereby made, so far as in favour of or descending upon females, shall be seclusive of the *jus mariti* and right of administration of any husbands they have married or may marry, and shall not be affectable by the debts or deeds of such husbands, or any diligence or execution competent to follow thereon; **WITH POWER** to our said trustees to **SUBMIT** to arbitration, or settle by the advice of counsel, all disputed claims competent to or against the said trust estates, or either of them, or among the parties interested therein; **TO COMPOUND** and take part for the whole of any disputed debts or claims; **TO LEND** out the trust funds on heritable security, or upon the debenture of any railway or other public company, or to invest the same in or lend upon the security of the Government funds, heritable property, feu duties, ground annuals, or the preference or guaranteed stock of any incorporated company with limited liability, **AND TO CALL UP** and change the said investments from time to time; **TO APPOINT** any one or more of their own number, or any other proper person or persons, to be factor or factors under them for the management of the trust estates, or either of them, and to allow such factor or factors a reasonable gratification for trouble; **BUT** for the intromissions of such factor or factors, and of any law agent or law agents appointed by them, they shall not be liable, provided the party or parties so appointed were reputed solvent at the time [Insert special limitation of liability as in No. 4, if desired]; **AND we RESERVE** our liferent use of our respective means and estate, **AND FULL POWER** to us, or either of us, to revoke, burden, qualify, explain, or in any way to alter these presents at pleasure, so far as regards our respective means and estate [see variations on the clause reserving power to revoke in note to Style No. 3]: **AND WE DISPENSE** with the delivery hereof, and **DECLARE**

Exclusion of marital rights.

Power to submit and refer;

to compound and transact;
to invest on real or personal security, etc.;

to change the investments;
to appoint factors, etc.;

Proviso as to liability.

Reservation of liferent.
Power to revoke.

Delivery.

that these presents, so far as unaltered, though found lying by us, or either of us, or in the custody of any person, undelivered at the decease of us, or either of us, shall have the full effect of a delivered evident; And we consent to the registration hereof for preservation.—In witness whereof, etc.

No. IX.—*Settlement of whole Estate in trust for Testator's only Son and his Family. Interest to vest in the Son at majority; whom failing, in his Family at majority, etc., or twenty-one years after Testator's death. Destination over to the Trustees or their Appointees in trust for the establishment of a School.*

I, A. B., being desirous of settling my affairs, and providing for the disposal of my means and estate after my decease, and for other good causes and considerations me hereto moving, Do hereby GIVE, GRANT, DISPONE, ASSIGN, CONVEY, and MAKE OVER to and in favour of

Disposition to trustees.

and to any other person or persons whom I may hereafter nominate and appoint, or who may be lawfully assumed into the trust, and to the acceptors and survivors and acceptor and survivor of them, the major number of them accepting and surviving and resident in Great Britain from time to time being a quorum, and to the heirs of the longest liver of them, as trustees and trustee for the ends, uses, and purposes after mentioned, and to the assignees of the said trustees or their said quorum, or their foresaids, All and Sundry lands, tenements, tacks, heritages, debts, goods, gear, effects, and sums of money, shares in trading or other companies, and in general the whole means and estate, heritable and moveable, real and personal, owing and belonging, or which shall be owing and belonging to me at my decease, or of which I may have the power of disposal, with the rents, interest, profits, and produce, and writings, titles, and vouchers thereof; AND further, I NOMINATE and APPOINT the said trustees and their foresaids to be my sole executors and executor, and universal intromitters and intromitter with my personal means and estate, with full power to give up inventories thereof, and confirm the same at pleasure, and generally to do everything pertaining to the office of executor; BUT THESE PRESENTS are

Appointment of executors.

Declaration of

trust, and grant of special powers.	granted, and are to be accepted by my said trustees and their fore-saids in trust, with the powers and privileges, and for the ends, uses, and purposes following, viz. :— THAT THEY MAY , as they are hereby authorized and empowered to do, call, sue for, uplift, receive, assign, and discharge the whole debts and effects due and belonging to me,
Power of sale.	WITH POWER to sell, realize, and convert into money the whole of my estates and effects, and sell and dispose of my heritable estate by public roup or private bargain, and for such price or other consideration as they may think fit, but the time and manner and propriety of selling my heritable property shall be entirely at the discretion of my said trustees ; DECLARING that the debtors to my estate, or the purchasers thereof, or other parties with whom my trustees shall transact, shall have no concern or right to interfere with the application of the sums paid to my said trustees, whose receipts shall be sufficient exoneration for the same ; AND my said trustees shall APPLY , as they are hereby authorized and empowered to apply, my said estates, and the produce thereof, in manner following, viz. :— IN
Trustees empowered to grant valid discharges.	THE FIRST PLACE , for payment of all my just and lawful debts, sick-bed and funeral charges, and likewise of the expenses of this trust, which debts, expenses, and others my said trustees may pay without requiring legal constitution : IN THE SECOND PLACE , my said trustees shall hold, pay, and apply the whole rest, residue, and remainder of my said means and estate to and for behoof of my son C. B., whom failing, for behoof of his surviving children, jointly with the issue of any who may have predeceased the period when they would have been entitled to share in the distribution of my estate (the division being <i>per stirpes</i>) ; which provision in favour of my said son shall vest in and be payable to him upon his attaining to majority ; and the annual income and produce thereof, or such part thereof as may be necessary, shall be applied for his behoof until he attains the said age, and the remainder thereof shall be added to the principal ; and as it is my wish that my said son should receive a sound and liberal education, I request my trustees to see that my wish in this respect is carried into effect ; and failing my son before the period when the succession would vest in his person, the said residue shall vest in and be payable to his descendants, as above provided, on their respectively attaining majority, or at the period of twenty-one years after my decease, which-
Purposes of the trust.	
1. Payment of debts and expenses.	
2. Destination of residue to testator's son and surviving children, etc.	
Residue to vest in testator's son at majority. Application of interest.	
Vesting of the contingent right.	

ever shall first happen : AND LASTLY, in the event of the decease of my said son and the failure of his issue before becoming entitled to payment of the said residue of my means and estate, my said trustees and their foresaids shall execute a conveyance to themselves, in conjunction with such other persons as they may think qualified by residence in the locality, or on other grounds, to assist in the administration of the trust hereinafter expressed, or to such other parties alone, AND to such persons as may be successively assumed into the trust, in virtue of the powers of assumption which my trustees are hereby authorized to confer on their appointees, and to the survivors and survivor of such as accept ; whom all failing, to trustees or managers to be nominated by the Court of Session, GIVING and GRANTING to such trustees all or any of the powers which are hereby conferred on my said trustees themselves, including the nomination of a quorum, the power of appointing factors and law agents, and the power of assuming new trustees, under such regulations as the trustees of this settlement may think proper to appoint in the deed of conveyance [*or to the Parochial Board for the time of the parish of Y., in the county of*], of the whole residue and remainder of my said means and estate, or such part thereof as may be in their hands unappropriated at the time, TO BE APPLIED by such trustees [*or by the said Parochial Board*] in the education of poor children whose parents shall reside within the said parish, as well as poor orphan children in the said parish ; AND I hereby PROVIDE and DECLARE, that the said trustees [*or the said Parochial Board*] shall have the fullest and most ample powers in the application and management of the funds and estate hereby committed to their charge, and that they may *inter alia* provide or build schools and schoolmaster's house or houses, and other necessary offices ; that they may choose and dismiss at pleasure the schoolmaster or schoolmasters, fix their salary or salaries, increase, alter, vary, and modify the same, prescribe and control the management and the course of education and teaching in the school, exact such fees, of such amount, from such of the children, their parents or guardians, as they may think proper ; and generally, that they shall have as full discretionary powers as I would have had, had I originated the endowment myself ; AND I PROVIDE and DECLARE, that with regard to the investment and management of the trust estate, the said trustees [*or the said*

Destination over to the trustees or their appointees for the endowment of a school.

Powers conferred by this settlement may be conferred on trustees of the charity.

Object of the bequest.

Powers of the trustees of the charity in relation to administration and management.

Powers of the trustees of the charity in rela-

tion to invest-
ments.

Board] shall have the same powers, and that they shall be entitled to the same privileges and exemptions, as are hereinafter conferred upon the trustees hereby appointed.

[Insert Declarations, Powers, and other formal clauses, as in No. IV., or such of them as may be applicable.]

SECTION III.

MARRIAGE SETTLEMENTS IN TRUST.

No. X.—*Form of Contract of Marriage, where the Husband has no available realized property.—Conveyance to Wife of furniture, etc. Jointure, with allowance for aliment and mournings. Trust assignation of Policy of Assurance, and obligation to pay further sum to Trustees within five years in security of the above, and of a provision of a fixed sum for the Children of the marriage, etc. Renunciation of marital rights. Conveyance of Wife's whole Estate to Trustees for Spouses in life and Children in fee. Discretionary Powers of advancement and restriction, etc.*

Acceptance as
spouses and
obligation to
solemnize
marriage.

Provisions by
the husband.

1. Conveyance
of furniture,
etc., to the
wife in case of
her survivance.

IT IS CONTRACTED, AGREED, and matrimonially ENDED, between the parties following, viz., A. B., merchant in X., of the one part, and Miss C. D., daughter of E. D., with the special advice and consent of her said father, of the other part, in manner following, that is to say,—The said A. B. and C. D. having conceived a mutual attachment, HAVE ACCEPTED, and hereby do accept of each other as lawful spouses, and PROMISE to solemnize their marriage with all convenient speed, agreeably to the rules of the church: IN CONTEMPLATION of which marriage, and for a provision to the said C. D. in the event of her surviving him, the said A. B. hereby ASSIGNS and CONVEYS to and in favour of the said C. D., in case of her surviving him, the whole household furniture, linen, plate, china, pictures, and books that may be belonging to him, situated in any house occupied by him at the time of his death, and the whole wines, liquors, and provisions that may be in the said house at the time of his decease: FURTHER, The said A. B. hereby binds and obliges himself, and his heirs, executors, and successors whomsoever, all jointly and severally, re-

nouncing the benefit of discussion and division, to CONTENT and PAY to the said C. D., during all the days and years of her life after his death, a free liferent annuity or jointure of L. sterling, restricted as after mentioned, payable half-yearly, at Whitsunday and Martinmas, by equal portions, beginning at the first term of Whitsunday or Martinmas that shall occur after his death for the half year succeeding the said term, with the lawful interest of each term's payment from and after the term of payment until payment, and one-fifth part of each term's payment further, in name of liquidated damages, expenses, and penalty, in case of, and for each failure in, the punctual payment of the said annuity, besides the same itself, and the lawful interest thereof foresaid; BUT DECLARING, that in the event of the said C. D. entering into a second marriage, the said annuity shall, from and after the first term of Whitsunday or Martinmas occurring after the date of such marriage, be reduced and restricted to the sum of L. sterling per annum, payable at the terms, and with interest and penalty, as is above provided in regard to the said annuity of L. sterling per annum: AND FOR SECURING, *pro tanto*, the payment of the said annuity and the provisions hereinafter made in favour of the children of the marriage, the said A. B. hereby assigns, transfers, and conveys to and in favour of

2. Annuity of L. per annum to the wife in case of her survival;

restrictable in the event of a second marriage.

Conveyance to trustees for securing provisions to wife and children.

, and the survivors and acceptors and survivor and acceptor of them, the major number surviving and accepting and resident in Great Britain from time to time being a quorum, and to the heirs of the last survivor of the acceptors, as trustees and trustee for the ends, uses, and purposes hereinafter written, ALL and WHOLE a policy of insurance effected on his life with the Life Assurance Society, dated the day of , numbered 10,000, for the sum of L. , with the whole sums therein contained, or to become due and payable under the same, and whole consequents thereof, with full power to the said trustees and their foresaids to uplift, receive, and discharge, or assign the same, or any part thereof, and to grant all writings necessary or proper in the premises: AND the said A. B. further BINDS and OBLIGES himself and his foresaids, within five years from the last date hereof, to make payment to the said trustees and their foresaids of the sum of L. ster-

Policy of insurance.

Husband becomes bound within five years to pay a fixed sum to trustees.

Application of fixed sum and proceeds of policy.

1. Expenses of trust.

2. Interest of fixed sum to be paid to the husband during marriage for alimentary purposes.

3. Upon dissolution of marriage, policy to be held for securing payment of annuity.

4. The balance to be held for securing the provisions in favour of the children.

Obligation by the husband to pay premiums and keep policy in force.

Trustees to have power, but not to be bound, to keep policy in force.

ling, with the interest thereof at the rate of five pounds per centum per annum, from the time the same becomes due until paid ;

DECLARING that the said trustees and their foresaids shall apply the said sum of L. sterling, and the proceeds of the said policy, when realized, for the ends, uses, and purposes following, namely :

IN THE FIRST PLACE, in payment of the expenses of executing this trust : IN THE SECOND PLACE, the said trustees and their foresaids shall pay the annual interest and produce of the said sum of L.

to the said A. B. during all the days of his life, for the alimentary behoof of the spouses and the children of their marriage, and the right and interest therein shall not be affectable by his debts or deeds, or the diligence of his creditors : IN THE THIRD PLACE, and upon the dissolution of the marriage, the said trustees and their foresaids shall apply the said sum, and also the proceeds of the said policy, when realized, for securing and paying, *pro tanto*, alike out of principal as of interest, the foresaid annuity or jointure of L.

sterling, restrictable as aforesaid ; with power to the said trustees and their foresaids, should they deem it proper, of which they shall be the entire judges, to purchase, secure, and provide a life annuity equal to the foresaid annuity of L. , or restricted annuity, on the life of the said C. D., or so much thereof as the funds in their hands may enable them so to purchase from any respectable insurance company, or from such party or parties as they may think proper : AND IN THE LAST PLACE, the said trustees and their foresaids shall hold and apply the rest, residue, and remainder of the said sums, if any, and the interest and other annual produce thereof, for securing and paying, *pro tanto*, the provisions hereinafter written in favour of the child or children of the said marriage :

AND the said A. B. hereby BINDS and OBLIGES himself, and his heirs, executors, and successors whomsoever, duly and punctually to content and pay to the said insurance company the premium and duty annually falling due on the said policy during all the days and years of his life, and report discharges thereof to the said trustees and their foresaids, and so to free and relieve the said trustees and their foresaids of the said annual payments, and whole consequents thereof ; DECLARING that the said trustees and their foresaids shall have right, but shall not be bound, to pay the said premiums out of the remainder of the funds under their charge, or to advance the

same themselves, and to charge the said A. B. therewith : AND the said A. B. also BINDS and OBLIGES himself strictly to conform to the whole terms and conditions of the said policy, and to observe and fulfil the same, so that it be preserved in full force and effect during all the days of his life ; DECLARING always, as it is hereby expressly provided and declared, that the said A. B. shall have full power and authority, at any time hereafter he may think proper, to pay to the said trustees or their foresaids the sum of L. , AND to require the said trustees or their foresaids to assign and convey to him or his assignees the said policy, sums therein contained and consequents, and the said trustees and their foresaids shall thereupon be bound to reconvey the same accordingly at his expense : AND IN THE EVENT of the said A. B. making payment of the said sum, the said trustees and their foresaids shall hold the same invested in the securities or purchases hereinafter mentioned, and shall, during the subsistence of the said marriage, make payment of the annual interest, or other annual produce thereof, as provided in regard to the foresaid sum of L. : FURTHER, the said A. B. BINDS and OBLIGES himself and his foresaids to pay to the said C. D., one day after his death, in case of her surviving him, the sum of L. sterling, for the purchase of mournings for herself and the family ; AND ALSO, a further sum corresponding to a yearly annuity of L. sterling, from the period from his death until the first term's payment of the annuity foresaid, and that in lieu of aliment and family expenses for and corresponding to that period : MOREOVER, the said A. B. hereby renounces and discharges his *jus mariti* and right of administration in, of and in relation to the whole estate and effects now owing and belonging, or which may hereafter be owing and belonging to the said C. D., and provides and declares that the said estate and effects shall be and remain a separate estate in her person, or in the person of such trustees or other persons as she may appoint to hold the same : AND FURTHER, and as a provision to the child or children of the said intended marriage, the said A. B. binds and obliges himself and his foresaids to content and pay to the said trustees and their foresaids, for the ends, uses, and purposes hereinafter specified, All and Whole the principal sum of L. , and that at and against the first term of Whitsunday or Martinmas

Husband bound to conform to conditions of policy.

Power to the husband to pay value of policy to the trustees ;

and to require assignation of policy.

Trustees to hold sum paid as an equivalent for the policy, and during marriage apply interest as they are directed to apply the interest of fixed sum.

Provision of L.100 for mournings.

A sum corresponding to termly annuity from husband's death till annuity becomes payable, as aliment and family expenses.

Renunciation of *jus mariti* and right of administration.

Obligation to pay a sum to trustees for children's provisions.

Power of division to the husband, whom failing, to the wife, over children's provision.

Failing division, provision to go to surviving children equally and their issue. Children's provision payable at first term after father's death; and upon attaining to majority or being married.

Failing issue, for behoof of husband and his heirs.

Interests of children to vest at the period of payment.

Discretionary powers in relation to settlement of husband's provision.

Interest until period of payment to be applied for children's behoof.

which shall occur six months after his decease, with the lawful interest from the said term of payment till payment, which sum of L.

sterling shall be held and applied by the said trustees and their foresaids in trust for behoof of the child or children of the said intended marriage, and the survivors and survivor of them, and the issue of the bodies of such of them as may decease leaving such issue, *per stirpes*, IN SUCH PROPORTIONS, and under such restrictions, and upon such terms and conditions, as the said A. B. may appoint by any writing under his hand; and in the event of the said A. B. failing to exercise the power of division hereby conferred, then in such proportions, and under such restrictions, and on such terms and conditions, as the said C. D. may appoint by any writing under her hand, executed after the decease of the said A. B.; but such deed of division shall not affect any share which may have previously vested in terms of the declaration hereinafter contained; AND FAILING such division, equally to and for behoof of all the said children, or the survivors and survivor of them, jointly with the issue of such of them as may have predeceased leaving issue; WHICH SUM of L. shall be payable to the child or children of the said intended marriage respectively at the first term of Whitsunday or Martinmas that shall occur after the decease of the said A. B., and after the said child or children shall respectively reach the years of majority or be married, whichever of these events shall first happen; AND FAILING such child or children and their issue, or in the event of their existing but all deceasing before the said term, the said sum shall be payable to the said A. B., his heirs and assignees, at the first term of Whitsunday or Martinmas that shall occur after the dissolution of the marriage without issue surviving, or after the decease of the longest liver of the child or children of the marriage and their issue as aforesaid; DECLARING ALWAYS, that the provisions before made in favour of the said child or children and issue shall not become vested interests in them until the term of payment thereof above mentioned; AND DECLARING that the annual proceeds of the foresaid principal sum of L. shall be held and applied by the said trustees for the maintenance, education, and upbringing, and other necessary expenses of the child or children of the said intended marriage, and the survivors and survivor of them and their issue as aforesaid, until the

period of payment of the fee as aforesaid; PROVIDING and DECLARING always, that the said trustees and their foresaids shall have right, and they are hereby authorized and empowered, to lay out, expend, and apply, before the foresaid term of payment, if they shall think proper, the whole of the foresaid sum of L.

Power to trustees to apply principal for children's benefit before term of payment.

sterling, or such part or parts thereof as they may deem fit, for the use or benefit of the child or children of the said intended marriage, or any of them, or for fitting them out in business or in marriage, or otherwise, as the said trustees may deem for the advantage of such child or children, the sum so applied to or for each child not being greater than his or her proportion of the said sum, in manner foresaid; and in the event of the said trustees exercising the said powers, the interest of such child or children as may be paid out, in the annual proceeds of the remainder of the said capital, shall cease and determine: AND further PROVIDING and DECLARING, but without prejudice to any deed or writing which may be executed by the said parties as aforesaid, that it shall be lawful to and in the power of the said trustees, if they shall think such course judicious, of which they shall be the sole judges, to postpone or delay the payment of the provisions in favour of all or any of the said children, or such part of the same as to them shall seem proper, till such period or periods as they shall consider fit, or even to restrict the interest of all or any of the said children in the said provision to a liferent alimentary provision, not affectable by their debts or deeds, or the diligence of their creditors, and to destine the fee thereof to their issue, in such proportions, and on such terms and conditions, as to them may seem most advisable; AND FOR THESE PURPOSES, the said trustees and their foresaids may retain in their own hands, or place in the hands of such trustees as may be appointed by any contract of marriage into which any of the said children may enter, or of such other trustees as the trustees herein named may appoint for the purpose, the whole or any part of the said shares; AND FURTHER, the said A. B. BINDS and OBLIGES himself and his foresaids to maintain, upbringing, educate, and support the child or children of the said marriage in a manner suitable to their station in life, until the sons attain majority, and the daughters attain majority or be married, or until the foresaid provision of L. sterling be payable to them respectively, whichever of

Power to trustees to suspend payment of children's shares, and to reduce same to liferent;

or to create a trust of such interests.

Obligation by the husband to maintain children.

*Settlement of
the lady's
estate.*

Conveyance to
trustees of her
whole estate.

Application
thereof

for behoof of
the spouses
and the sur-
vivor of them
in alimentary
liferent;
and for the
children of the
lady in fee,

in such pro-
portions as she
or the husband,
if he survive,
may appoint;

falling which,
to the surviv-
ing children
and their issue
equally.

Provisions to
be payable
after death of
longest liver
of spouses, and
after children
attain major-
ity or are
married;
and to vest at
term of pay-
ment.

these events shall first happen; FOR WHICH CAUSES, and on the other part, the said C. D. ASSIGNS, DISPONES, CONVEYS, and MAKES OVER from her, to and in favour of the said trustees and their fore-saids, ALL and SUNDRY lands and heritages, goods, gear, debts, claims, legacies, funds, stocks, and generally the whole property, heritable and moveable, now belonging or resting owing to her, or that shall pertain and become owing and belonging to her during the subsistence of the said intended marriage, excepting only her provisions before specified, with the whole vouchers and instructions of the premises, and full power and liberty to uplift, receive, and discharge the same, and with all action and execution competent to her thereanent; DECLARING that the said estate and effects, and the proceeds and annual interest and produce thereof, shall be held and applied by the said trustees and their foresaids for behoof of the said A. B. and C. D. during the subsistence of their marriage in alimentary liferent, and for behoof of the survivor of them, also in liferent, and as an alimentary provision for behoof of himself or herself, and of the child or children of the said C. D.; and that the fee thereof shall be held and applied for behoof of the lawful children of the said C.D., whether of the present or of any future marriage, and the survivors and survivor of them, and of the lawful issue of such of them as may decease leaving such issue, IN SUCH PROPORTIONS, and with such restrictions, and on such terms, and payable at such periods as the said C. D., or (in the event of her predecease) as the said A. B. may appoint, by a writing under her or his hand; AND FAILING such appointment, equally to and among the said children or the survivors of them, jointly with the lawful issue of such of them as may decease leaving issue (the division being *per stirpes*); AND unless otherwise directed in any writing which may be executed as aforesaid, the said provisions shall be PAYABLE to the said child or children at the first term of Whitsunday or Martinmas occurring after the death of the longest liver of the said spouses, and after the said child or children shall respectively attain to majority or be married, whichever of these events shall first happen: DECLARING that the said provisions shall not become vested interests in the said child or children until the term of payment above mentioned, and providing that the shares of the whole provisions under these presents falling to such of the

issue of the said child or children who may be in minority, shall be paid to his or her legal guardians; AND FAILING such child or children and their lawful issue, or in the event of their existing but all deceasing before the said term of payment of their provisions, then for behoof of the said C. D., and of her nearest heirs whomsoever, or assigns, in fee; DECLARING that the liferents above written are and shall be strictly alimentary, and not affectable by the debts or deeds of the said spouses, or either of them, or of the survivor of them, or by any diligence or execution, personal or real, competent to follow hereon: AND ALSO DECLARING, as it is hereby expressly provided and declared, that in the event of the dissolution of the said marriage by the decease of the said A. B. without a living child being procreated of the same, or in the event of a child or children existing, but of such child or children and their issue all predeceasing the said C. D., the trust hereby created in regard to her means and estate shall, upon the execution by her of a declaration in writing to that effect, cease and come to an end, and the said trustees and their foresaids shall reconvey and pay her said estates, and the proceeds and annual produce thereof, to the said C. D. and her heirs and assignees; AND ALSO DECLARING, as it is hereby expressly provided and declared, that the foresaid annuity in favour of the said C. D., and the whole provisions hereby conceived in favour of or descending upon females, whether provided by the said A. B. or C. D., SHALL BE SECLUSIVE of the *jus mariti* and right of administration of husbands, and of the debts and deeds of such husbands, or of any diligence or execution competent to follow thereon; AND THAT it shall be LAWFUL to the said trustees, with consent of the said A. B. and C. D., or the survivor of them in life, to withdraw from the said liferent, or, after the lapse thereof and before the child or children of the said marriage shall be paid, to pay a portion or the whole of the estimated share or shares of any of the children of the said marriage to, or towards setting them up in business, or fitting them out in marriage, of the expediency of which, as well as of the amount so to be applied, the trustees shall be the sole judges; AND ON THE OTHER HAND, the said trustees and their foresaids shall have the same power of withholding payment, and the same powers of restriction in regard to the means and estate of the said C. D. as

Shares of remoter issue payable to legal guardians.

Failing issue, for behoof of the lady and her own heirs. Liferents declared alimentary.

In the event of the husband's predecease and failure of issue, widow may bring trust to a close.

Discretionary powers and general provisions.

Jus mariti and right of administration of husbands of females excluded.

Trustees to have power to anticipate payment to children;

and power to restrict to liferent, as in case

of provision
made by the
husband.

Provisions to
be in satisfac-
tion of legal
rights of the
spouses.

Discharge of
legal provi-
sions.

Discharge of
legitim.

Reservation
of right in
competition
with children
of subsequent
marriage.

Proviso as to
collation.

Power to lend
or to invest in
real or per-
sonal security ;

to deposit in
bank ;
to change se-
curities.

is herein-before provided in their favour, in regard to the provision herein-before made by the said A. B. in favour of the child or children of the said marriage ; WHICH PROVISIONS herein-before written in favour of the said spouses shall be, and hereby are, accepted of by them respectively, as in lieu and in full satisfaction of all terce or courtesy of lands, *jus relictæ*, or legal share of moveables, and of any and every other right or claim which he or she or his or her heirs, executors, or representatives, could ask or claim by or through the decease of either of the said spouses, or out of the goods in communion between the spouses, the good-will of each spouse only excepted [*if the husband is possessed of, or has the prospect of succeeding to, English real estate, the following words may be added :* And also in lieu and in full bar and satisfaction of the dower or thirds which at the common law or by custom the said C. D. could, or otherwise might claim out of any English estate that may belong to the said A. B.]; AND such terce, courtesy, *jus relictæ*, and other rights, are hereby discharged accordingly ; AND IN CONSIDERATION of the foregoing provision in favour of the children of the marriage, their right to legitim is hereby discharged, EXCEPT in the event of legitim being effectually claimed by the children of any subsequent marriage, in which case their right to a share of the legitim fund is reserved ; BUT IN CASE of their accepting such last reserved right, they shall be bound to collate and renounce the provisions hereby conceived in their favour : AND the parties hereto provide and declare, that the said trustees and their foresaids, whether acting under the first or second part of these presents, shall be and are hereby specially AUTHORIZED and EMPOWERED to lend out the trust funds, or any part thereof, upon the security of lands or houses, or other heritable property, in Great Britain, or the debentures of any British railway company, or on the security of the Government funds, or of shares in chartered or incorporated companies in Great Britain ; OR TO INVEST the same in the purchase of lands, houses, or other heritable property, feu duties, or ground-rents, in Great Britain, or Government stock, or of shares in the stock of any chartered or incorporated company in Great Britain in which the liability of each shareholder is limited to the value of the stock held by himself ; OR TO RETAIN the same in Bank in Great Britain, and from time to time to alter and renew the securities as may be

necessary, or may seem to them proper : **DECLARING** that the said trustees and their foresaids shall have the most ample powers in realizing and uplifting the interest of the said C. D. in any trust or other estate in which she may be a beneficiary ; that they may settle by compromise, arbitration, or by the advice of counsel, any questions which may arise relative thereto ; concur in realizing, in such manner as they may deem expedient, any such estate, and grant in favour of the trustees, or other parties administering the same, all discharges, ratifications, and acquittances they may deem proper in the premises : **DECLARING** also, as it is hereby expressly provided and declared, that the said trustees shall not be liable for the sufficiency of the securities upon which they may invest any part of the trust funds, or of the company from which they may purchase an annuity as aforesaid, provided such security or company was reckoned sufficient at the time of the investment or purchase ; nor shall they be liable that the property, funds, or shares which they may purchase with the trust funds, or any part thereof, shall realize the price or prices at which the same were purchased, but each of them shall be liable for his own actual intromissions only, deducting and retaining his necessary expenses and disbursements, conform to receipts under his hand [*See No. 4 for form of special indemnity clauses*] ; **WITH POWER** to the said trustees to nominate and appoint any one of their own number, or any other proper person or persons, to act as factor under them, in the management of the trust, allowing him or them a reasonable gratification for trouble, for whose management and intromissions they shall not be liable, provided he or they find security for intromissions which was reckoned sufficient at the time it was taken ; **WITH POWER ALSO** to the said trustees and their foresaids to nominate and assume, from time to time, a trustee or trustees to act along with them in the said trust, or in place of any of their number who may decline to accept, or who may de cease or resign : **DECLARING**, that so soon as the acting trustees under these presents are reduced to two, they shall be obliged to nominate and assume at least three other trustees to act along with them in the management of the said trust ; and there are hereby conferred upon the said trustee or trustees who may be assumed from time to time the whole powers, privileges, and exemptions conferred upon the trustees hereby named : **AND IN DE-**

Special powers in relation to the realization and management of the wife's estate.

Provision as to liability for investments.

Power to appoint factors.

Trustees may assume other trustees in place of any who die, or resign, or decline to accept.

Proviso as to exercise of power of assumption.

Appointment

of tutors and
curators.

Limitation of
liability of
tutors and
curators.

Registration
for execution.

FAULT of any subsequent appointment to be made by himself, the said A. B. hereby nominates, constitutes, and appoints the trustees hereby named, and their foresaids, to be tutors and curators and tutor and curator to any child or children who may be born of the said marriage, with all the powers, privileges, and exemptions hereby conferred upon the said trustees, or belonging by law to the office of guardian, according to the most liberal interpretation; **SUBJECT** TO the declaration that such tutors and curators shall not be liable for omissions, nor the one for the other, either *in solidum* or *pro rata*, but each for his own actual intrusions with the means and estate of the said children, and for his own individual acts of administration: **AND BOTH PARTIES** consent to the registration hereof for preservation and execution.—In witness whereof, etc.

No. XI.—*Form of Contract of Marriage, where the Husband has realized property. Jointure to Widow; aliment and mournings. Discharge of marital rights. Provision to Children varying with the number. Special conveyance of Heritable securities, Stock and interest in Trust Estate in security of Wife and Children's provisions. Purposes of trust, and powers. Conveyance by Wife as in No. X.*

Acceptance as
spouses, and
obligation to
solemnize
marriage.

Provisions to
wife.
Obligation to
pay jointure.

THIS CONTRACT of **MARRIAGE**, entered into by and between the parties following, viz., A. B., of X., of the one part, and Miss C. D., daughter of E. D., Esquire of Y., of the other part, witnesseth, that whereas the said A. B. and C. D., having conceived a mutual attachment, **HAVE ACCEPTED**, and hereby do accept of each other for lawful spouses, **AND PROMISE** to solemnize their marriage with all convenient speed, agreeably to the rules of the Church: **IN CONTEMPLATION** of which marriage, and for a provision to the said C. D., in case of her surviving him, the said A. B. hereby **BINDS** and **OBLIGES** himself, and his heirs, executors, and successors whomsoever, all jointly and severally, renouncing the benefit of discussion and division, to content and pay to the said C. D., during all the days and years of her life after his death, a free life rent annuity or jointure of L. sterling, payable half-yearly by equal portions, beginning at the first term of Whitsunday or Martinmas that shall happen after his death for the half year succeeding the

said term, with the interest of each term's payment at the rate of L.5 per centum per annum, from and after such term until payment, and one fifth part of each term's payment further in name of liquidated damages, expenses, and penalty, in case of and for each failure in the punctual payment of the said annuity, besides the same itself, and the interest thereof at the rate of L.5 per centum per annum; AND ALSO, a further sum of L. sterling in lieu

Allowance for
aliment and
mourning.

of aliment and family expenses for the period from his death until the first term's payment of the foresaid annuity, and the sum of L. for mournings: MOREOVER, the said A. B. hereby

Discharge of
marital rights.

renounces and discharges his *jus mariti* and right of administration in, of, and in relation to the whole estate and effects now owing and belonging, or which may hereafter be owing and belonging to the said C. D., and provides and declares that the said estate and effects shall be and remain a separate estate in her person, or in the person of such trustees or other persons as are hereinafter or may be law-

Provisions to
children.

fully appointed to hold the same; AND FOR A PROVISION to the child or children of the said intended marriage, the said A. B. hereby BINDS and OBLIGES himself and his foresaids, all jointly and severally, renouncing the benefit of discussion and division, to pay to the trustees after named and designed, and their successors in office, as after mentioned, for the ends, uses, and purposes hereinafter specified, the sums following, viz.: IN THE EVENT of there being

Sums payable
in the event of
one, two, three,
or more chil-
dren surviving

only one child of the said intended marriage, or only the issue of one child who may have previously deceased, surviving the said A. B., the sum of L.1000 sterling; in the event of there being two children of the said marriage either surviving the said A. B. or represented by lawful issue him surviving, the sum of L.2000 sterling; and in the event of there being three or more children of the said marriage either surviving the said A. B. or represented by lawful issue him surviving, the sum of L.3000 sterling; and that at the first term of Whitsunday or Martinmas occurring after his decease, with interest thereon at the rate of L.5 per centum per annum from and after that term until payment; WHICH SUM, or the subjects hereinafter conveyed to the trustees of this contract in security thereof, shall be held and applied by the said trustees in trust for behoof of the child or children of the said marriage, and the survivors and survivor of them, and the lawful issue of such of them as

Application of
sum provided.

Reserved
power of
division;

failing which,
the division to
be equal
amongst the
surviving chil-
dren jointly
with issue, etc.

Provisions to
be payable to
the children at
majority or
marriage;

and not to vest
until the term
of payment.

Conveyance to
trustees in
security of the
provisions.

(1.) Heritable
security.

may have deceased leaving issue, IN SUCH SHARES and proportions, under such restrictions, and payable at such times and in such manner as the said A. B. may appoint by any testamentary or other writing under his hand [*a qualified power of division is sometimes given to the wife as in No. X.*]; AND FAILING such division, equally to and for behoof of the children of the said marriage, and to the survivors and survivor of them, jointly with the issue of such of them as may have predeceased leaving issue (the division being *per stirpes*); AND IN THE EVENT of the said A. B. failing to exercise the power of division hereby reserved to him, the said provisions shall be payable to the child or children of the said intended marriage respectively at the first term of Whitsunday or Martinmas that shall occur after the decease of the said A. B., and after the said child or children shall respectively attain the years of majority or be married, whichever of these events shall first happen; and failing such child or children and their issue, or in the event of their existing but all deceasing before the said term, the said sum shall be payable to the said A. B., his heirs and assignees, at the first term of Whitsunday or Martinmas that shall occur after the dissolution of the marriage without issue surviving, or after the decease of the longest liver of the child or children of the marriage and their issue as aforesaid; IT BEING THE INTENTION of the parties that the provisions before made in favour of the children of the marriage shall vest in them at and only upon the arrival of the term of payment foresaid: AND FOR SECURING, *pro tanto*, payment of the said annuity and the provisions hereinafter made in favour of the children of the marriage, the said A. B. hereby ASSIGNS, DISPONES, and CONVEYS to and in favour of

and the survivors and acceptors and survivor and acceptor of them, the major number surviving and accepting and resident in Great Britain from time to time being a quorum, and to the heirs of the last survivor of the acceptors, as trustees and trustee for the ends, uses, and purposes hereinafter written: PRIMO, A bond and disposition in security, dated the day of , for the sum of L. , granted by M. N. in favour of the said A. B., with interest from the day of , and also All and Whole [*here describe the lands*], all as specified and described in the said bond

and disposition in security, which is registered in the Register of Sasines at on the day of ; SECUNDO, (2.) Personal estate.
 All and Whole the sum of L. of the stock of the
 Railway Company, conform to a separate transfer thereof, of the
 date of these presents, executed by the said A. B. in favour of the
 parties herein nominated as trustees, declaring that the said stock
 transferred as aforesaid shall be held and applied by the said parties
 for the same purposes as are hereinafter declared in relation to the
 estate hereby conveyed to the trustees; TERTIO, All and Whole (3.) Interest under an existing trust.
 the whole right, share, and interest now belonging to and vested in
 the said A. B., or which may hereafter belong to or become
 vested in him, of and in the means and estate of his parents, or
 either of them, under or in terms of the marriage-contract entered
 into between them, dated the day of , and
 recorded in the Books of Council and Session the days of
 , including any right, share, and interest which may
 have accresced or may accresce to him under the provisions of the
 said contract in consequence of the decease of any of his brothers
 or sisters, but excepting from this conveyance any right, share, and
 interest which may have vested or may vest in such brothers or
 sisters, and may accrue to him as their executor or legatee; AND
 SPECIALLY EXCEPTING therefrom the principal sum of L. Exception of a part of the subject conveyed in security.
 part of his right, share, and interest under the provisions of the
 said marriage-contract, which is hereby specially reserved to himself
 to uplift and dispose of at pleasure; with full power to the said
 trustees and their foresaids to uplift, receive, assign, and discharge
 the same, and to sue for and recover the same, and to grant all
 writings and take all steps necessary for that purpose; excepting
 always from this power the said principal sum of L. , reserved
 as aforesaid: DECLARING that the said trustees and their foresaids
 shall apply the subjects hereby conveyed, or which may be realized
 by them in virtue of the powers herein conferred, for the ends,
 uses, and purposes following, viz.: IN THE FIRST PLACE, in payment
 of the expenses of executing this trust: IN THE SECOND PLACE,
 the said trustees shall pay the annual interest and produce of the
 said estate hereby conveyed to them, so far as realized, to the said
 A. B. during all the days of his life, for the alimentary behoof of
 the spouses and the children of their marriage; and the right and
 Application of the funds conveyed in security.

1. Payment of expenses.
2. Interest to be paid to the husband for alimentary purposes.

interest therein shall not be affectable by his debts or deeds, or the diligence of his creditors: **IN THE THIRD PLACE**, and upon the dissolution of the marriage, the said trustees and their foresaids shall apply the proceeds of the said estate hereby conveyed to them, when realized, for securing and paying, *pro tanto*, alike out of principal as of interest, the foresaid annuity or jointure; **WITH POWER** to the said trustees, should they deem it proper, of which they shall be the sole judges, to secure the said annuity, in whole or in part, by purchasing an annuity from any respectable insurance company, or from such party or parties as they may think proper: **AND IN THE LAST PLACE**, the said trustees shall hold and apply the residue and remainder of the estate hereby conveyed to them in payment of the foresaid provisions in favour of the child or children of the said marriage, and their lawful issue, in terms of the destination above written; **AND ANY SURPLUS** remaining in their hands after fulfilment of the purposes herein-before contained shall be paid to the said A. B., his heirs and assignees; **AND FAILING** any child or children of the said marriage and their issue, or in the event of their existing but all deceasing without having acquired a vested interest in the provisions above written, the whole residue, after paying or securing the foresaid liferent annuity, shall be paid and applied in the same manner as is above directed with regard to the said surplus; **DECLARING** that the annual proceeds of the said estate hereby conveyed to the said trustees shall be held and applied by them for the maintenance, education, and upbringing, and other necessary expenses of the child or children of the said intended marriage, and the survivors and survivor of them and their issue as aforesaid, until the period of payment of the fee as aforesaid; **PROVIDING** and **DECLARING** always, that the said trustees and their foresaids shall have right, and they are hereby authorized and empowered, to lay out, expend, and apply, before the foresaid term of payment, if they shall think proper, the whole of the foresaid estate hereby conveyed, or such part or parts thereof as they may deem fit, for the use or benefit of the child or children of the said intended marriage, or any of them, or for fitting them out in business or in marriage, or otherwise as the said trustees may deem for the advantage of such child or children, the sum so applied to or for each child not being greater

3. After husband's death, fund to be applied in the first instance in payment of the jointure.

Trustees empowered to purchase an annuity.

Residue chargeable with children's provisions.

Surplus, if any, to revert to the husband's assignees.

Idem, as to whole residue, in the event of failure of issue.

Proceeds of fund during minority to be applied for the maintenance of the children.

Trustees empowered to anticipate payment of children's provisions.

than the share appointed or falling to him or her out of the said estate in manner foresaid; and in the event of the said trustees exercising the said powers, the interest of such child or children as may be paid out in the annual proceeds of the remainder of the said capital shall cease and determine: AND further PROVIDING and DECLARING, but without prejudice to any deed or writing which may be executed by the said A. B. as aforesaid, that it shall be lawful to, and in the power of the said trustees, if they shall think such course judicious, of which they shall be the sole judges, to postpone or delay the payment of the provisions in favour of all or any of the said children, or such part of the same as to them shall seem proper, till such period or periods as they shall consider fit; OR EVEN to restrict the interest of all or any of the said children in the said provision to a life interest alimentary provision, not affectable by their debts or deeds, or the diligence of their creditors, and to destine the fee thereof to their issue in such proportions, and in such terms and conditions, as to them may seem most advisable; AND FOR THESE purposes, the said trustees and their foresaids may retain in their own hands, or place in the hands of such trustees as may be appointed by any contract of marriage into which any of the said children may enter, or of such other trustees as the trustees herein named may appoint for the purpose, the whole or any part of the said shares: AND FURTHER, the said A. B. BINDS and OBLIGES himself and his foresaids to maintain, upbringing, educate, and support the child or children of the said marriage in a manner suitable to their station in life, until the sons attain majority, and the daughters attain majority or be married, or until the proceeds of the foresaid estate be payable to them respectively, whichever of these events shall first happen: FOR WHICH CAUSES, AND ON THE OTHER PART, etc. [as in Style No. X., adding a direction to record the clause of assignation of bond and disposition in security, as above, or any other heritable property which may be the subject of a special conveyance].

Trustees empowered to suspend payment of children's provisions;

or to restrict interest to a life interest;

or to create a trust.

Obligation by the husband to maintain children.

Settlement of wife's estate.

No. XII.—*Contract of Marriage, where the Husband is presumptive heir to an entailed Estate.—Jointure to Widow, secured upon the rents of the Estate.—Obligatory provisions to Widow and Children as in preceding examples.*

Acceptance as spouses, and obligation to solemnize the marriage.

Narrative of the husband's titles.

Jointure of L. per annum to the lady under the Aberdeen Act, restricted in terms of that Act.

IT IS CONTRACTED, AGREED, and matrimonially ENDED between the parties following, viz., A. B., Esquire, eldest son of E. B., Esquire of X., on the one part, and Miss C. D. of Y., on the other part, in manner following: That is to say, the said A. B. and C. D. have agreed to accept, and do hereby accept, of each other as lawful spouses, and bind and oblige themselves to solemnize their marriage with all convenient speed in usual form: IN CONTEMPLATION of which marriage, the said A. B., considering that he is the heir next entitled to succeed after his said father to the entailed lands and estates of X. and others in the counties of E. and F., under the several deeds of entail thereof, viz. [*here narrate the titles*]; and that upon the treaty for the said intended marriage, it was agreed that the said A. B. should, in anticipation of his succession to the said several entailed lands and others, settle and secure to the said C. D., his intended wife, in the event of her surviving him, a jointure to the full amount permitted to heirs of entail by the Act of Parliament passed in the fifth year of the reign of his late Majesty King George the Fourth, chapter eighty-seven, entituled "An Act to authorize the proprietors of entailed estates in Scotland to grant provisions to the wives or husbands and children of such proprietors;" but subject to postponement, in terms of the said Act, during the subsistence of a prior jointure on the said lands and others, and subject to all the other provisions of the said Act: THEREFORE, the said A. B., as if he had already succeeded to the said several entailed lands and others, and were in possession and infest therein, does hereby, in virtue of the powers contained in the said Act, and of all other powers and faculties competent to him, PROVIDE and BIND and OBLIGE himself, and the heirs of entail succeeding to him in the entailed lands and estates herein-before and after mentioned, duly and validly to infest and seise the said C. D., his intended wife, in case she shall survive him, in an annuity or liferent provision, out of the entailed lands and others hereinafter described, by

way of annuity, of L. sterling per annum, free of all burdens and deductions whatsoever, except property and income tax, during all the days of her life, but subject to postponement, as provided by the said Act, during the subsistence of the prior jointures affecting the said lands and others (if the same shall be subsisting at the death of the said A. B.), and subject also to restriction, in terms of the said Act, in the event of the said sum of L. exceeding the sum permitted by the said Act, and subject also to the whole other conditions, provisions, and limitations applicable thereto, contained in the said Act: To be uplifted and taken at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first of these terms next after the decease of the said A. B. for the half year immediately following, and so forth half-yearly thereafter in advance, during the lifetime of the said C. D., with a fifth part more of liquidate penalty for each term's failure in payment of the said annuity, and interest thereof, at the rate of five per centum per annum, from the respective terms of payment thereof, during the not payment of the same; furth of All and Sundry the lands and others after mentioned, viz. [*here take in the description of the lands*]: To be holden, the said annuity or liferent provision of L. sterling, subject as aforesaid, upliftable furth of the lands and others before described, but always with and under the conditions, provisions, and limitations expressed in the said Act, by the said C. D. of and under the said A. B., and his heirs and successors in the said lands and others, in free blench farm for payment of one penny Scots money upon the ground of the said lands at Whitsunday yearly, in name of blench farm, if asked only: And further, the said A. B. hereby assigns and makes over to the said C. D. as much of the rents, profits, and duties of the lands and others before described as will completely satisfy and pay the said annuity, under the conditions, provisions, and limitations foresaid, yearly and termly, as the same shall become due, with interest as aforesaid, and penalties if incurred; with power to her to uplift and receive the same from the tenants and possessors of the lands and other heritages before described, and, if necessary, to pursue actions of maills and duties, or of poinding the ground for payment of the same, and all other legal diligence, in so far as the same may be consistent with the

Description of
the lands.
Tenendas.

Obligation by the husband to complete titles on his succession, and grant corroborative deeds for securing the jointure.

terms of the foresaid Act of Parliament : And it is hereby declared that the said C. D. shall be entitled to receive the foresaid annuity or liferent provision in addition to the revenue of her own fortune, hereinafter provided to her : AND FURTHER, the said A. B. hereby binds and obliges himself, immediately on his succeeding to the said entailed lands and estates, to obtain proper titles thereto completed in his person, and to grant, at his own expense, valid and sufficient corroborative heritable bonds of annuity, and such other deed or deeds as may be requisite or proper for effectually securing the said annuity or liferent provision to the said C. D., but always with and under the conditions, provisions, and limitations expressed in the said Act ; and which annuity or liferent jointure of L. , subject to postponement and restriction as aforesaid, the said A. B., in the event of his surviving his said father, binds and obliges himself, and his heirs, executors, and representatives whomsoever, to warrant to the said C. D. at all hands and against all mortals : And further, in case the said A. B. shall happen to predecease his father, the said E. B. (in which event the foresaid annuity or liferent provision would not take effect), the said A. B. hereby binds and obliges himself [*Provisions in obligatione to the widow and children may be inserted as in the previous examples. The disposal of the wife's fortune will be similar, unless a special trust is to be created, when of course the form must depend on the intention of the parties*].

NOTE.—The form here given is applicable to the case where the husband is in the position of presumptive heir to an entailed estate. The form can easily be altered to suit the case where the husband has already succeeded to estates either entailed or in fee-simple. Provisions to younger children may also be secured upon the estate or the rents according to circumstances ; but as the machinery of a trust is not requisite in this class of contracts, except for the purpose of securing the lady's fortune, we have not thought it necessary to multiply examples.

SECTION IV.

STYLES OF TRUST SETTLEMENTS *inter vivos*.

No. XIII.—*Trust Disposition of Heritable Estate for sale and division of the proceeds amongst the Trustee's Creditors.—Power to effect temporary loan.—Provisions as to interim payment of interest.—Reversion, if any, to be reconveyed to the Trustee under deduction of taxed expenses.*

I, A. B. of X., heritable proprietor in fee-simple of the lands and estate of X., Y., and others hereinafter disposed, CONSIDERING that I am owing and indebted to creditors holding heritable securities over my lands and estate, hereinafter described, as follows, viz.—
To the Insurance Company the sum of L. [insert names of creditors and amounts of debts], as also an annual rent-charge on my said estates for drainage and improvements on the same, amounting to L. per annum, and redeemable on payment of L. or thereby, amounting the said heritable debts to L. or thereby; and whereas I am further indebted to other creditors, viz.—To the sum of L., with any arrears of interest due on the same, to the sum of L., and any arrears of interest due thereon; to various persons upon open account and personal obligations a further sum or floating balance, which has been calculated to amount at the date hereof to L.; and whereas the foresaid debts and obligations due by me cannot be repaid excepting by the sale of parts or of the whole of my lands and estates, after described; AND WHEREAS it has been thought advisable for the proper arrangement of my affairs, and for the ultimate payment of all my debts before enumerated, that a sum should be borrowed on the security of my said lands and estates for the purpose of paying off the whole of the said sums due upon open account and personal obligation, and for the further purpose of maintaining a proper management of the said estates until the same shall be sold: and whereas the Insurance Company have agreed to advance the sum of L. for the purpose afore-

Narrative.
Specification
of heritable
creditors.

Personal cre-
ditors.

Arrangement
for a temporary
advance.

Prior trust.

said [as also for payment of the debts due by me to _____, my present trustee, amounting to about L. _____], and for other

Agreement to execute trust.

purposes, for which sum I have already granted, or am about to grant, in favour of the said Insurance Company, a bond and disposition in security over my lands and estate, after described; and I have entered into an arrangement with the said Insurance Company and my other creditors, under which it was agreed that I should convey the whole of my said lands and estates, heritable and personal, in trust to _____ and

Dispositive clause.

and to their successors in office, or to co-trustees to be appointed in manner after mentioned, for the purpose of being held by them in trust for the security and benefit of my said creditors, and for repayment to them, according to their respective rights and preferences, of the before-mentioned principal sums and whole interest accruing thereon; with full powers to the said trustees both to manage the said estates and to sell and dispose of the whole or such parts thereof as should be found or considered by them to be necessary or proper, according to their judgment and discretion, and to apply the rents and the proceeds of such sales in payment of the said principal sums and interest thereon: **THEREFORE** I, the said A. B., heritable proprietor foresaid, do hereby give, grant, alienate, dispoise, and assign to and in favour of the said _____ and

Power of assumption.

_____, and the acceptor and survivor of them, as trustees or trustee for behoof of my creditors foresaid, and for the uses, ends, and purposes, with the powers and under the conditions, provisions, and declarations after written; Declaring that the said trustees, and the acceptor and survivor of them, shall have power to manage and execute the trust hereby created, without the consent or concurrence of myself or any of my said creditors being necessary to any acts or deeds done or granted by them, as more fully after expressed, **AND ALSO** that my said trustees, or the acceptor and survivor of them, shall have power to nominate and appoint, or assume into the said trust, two trustees, to act either along with them, or after their deaths or resignation, or the death or resignation of the acceptor, as hereinafter provided for; it being hereby stipulated and declared that not more than three trustees shall be acting at any one time, and that in the event of my trustees hereby appointed nominating and assuming two additional trustees, which they are authorized to

do if they shall see cause, the right of one of such assumed trustees to act in virtue hereof shall remain suspended until the death or resignation of one or other of my said two trustees, in the event of both accepting, or of the other of the said assumed trustees, in which event the right of the said estate hereby disposed, and the management and execution of the said trust, shall then devolve upon, and be vested in, the said trustees, original and assumed, and to the assignees of the said trustees acting for the time in the said trust, heritably and irredeemably, All and Whole [*insert the description*]; As also, All and Sundry other lands and heritages presently belonging to me, and all my right, title, and interest, present and future, in the said lands; As also, the rents, maills, profits, duties, and casualties of the lands and other heritages before disposed, now due and payable, or which may hereafter become due and payable, by the tenants and possessors thereof, and all action, diligence, and execution already used and competent to me for recovery thereof; And further, I do hereby dispoise and assign to my said trustees, and to their assignees, All and Sundry debts and sums of money due to me at the date hereof; As also, all household furniture, farm stock and crops, policies of insurance, and all other moveable goods, gear, estate, and effects of every description pertaining to me; but with the exception of the articles specified in an inventory signed by me, and delivered to my said trustees, which said articles are hereby expressly reserved; AND I OBLIGE myself and my heirs and successors to execute and deliver all writs and deeds necessary for vesting in the persons of my trustees and their assignees the estates, both heritable and personal, hereby conveyed; And I hereby declare that these presents are irrevocable, and shall subsist in full force and effect until the whole purposes hereinafter specified shall have been fulfilled; DECLARING further, that the same are granted by me, and shall be accepted by my said trustees in trust, for the uses, ends, and purposes, with the powers and under the conditions, provisions and declarations, privileges, and immunities after written, and specially to the intent and purpose that my whole lands and estates, and other property, real and personal, herein-before conveyed, and the prices and proceeds thereof, or of such parts and portions thereof as shall be sold, shall be held and applied by the trustees or trustee acting in the

Description of
subjects of con-
veyance.

Reservation of
certain articles.

Obligation
to complete
titles.

Declaration of
trust.

with all such other expenses as my said trustees, in the exercise of their discretion, shall judge necessary, and may incur in the proper management and preservation of my said lands and estates, heritable and personal : In the THIRD place, after satisfying the purposes before specified, the said trustees shall apply the remainder of the rents and annual produce of the said estates during the subsistence of this trust, and also the proceeds of my personal estate when realized, and the prices of lands to be sold, in payment of the interest of the several debts before specified, and that half-yearly and termly as they respectively fall due, according to the legal priority and preference of the said debts ; and after payment of interest, then in payment of such portion of the principal sums as my said trustees shall have sufficient funds at the time to pay off ; and also in pay-
ment of the premium, amounting to L. per annum, upon
a policy of insurance for L. , effected on my life on the

3. Payment of interest ;

including premiums on policy of insurance.

day of with the Insurance Com-
pany of Scotland, and that regularly as it becomes due, during the subsistence of this trust, or until the debts in security of which the said policy has been assigned shall have been paid and discharged, if they shall have been so paid and discharged during the subsistence hereof : And I hereby authorize and empower my said trustees, if they shall consider it to be advisable, to surrender the said policy of insurance, or to sell and dispose thereof in such way as they may consider best for the interests of the trust estate : And in respect that the foresaid advance of by the Insurance Company is postponed to the foresaid preferable heritable securities, amounting to L. , it is hereby provided, that in the event the

Unpaid arrears of interest to be accumulated with the principal.

rents and annual proceeds at the time, and the price received for lands sold, or balance thereof remaining in the hands of the trustees, shall not be sufficient to enable them to pay at each term of Whitsunday and Martinmas the whole interest on the debt then due to the said Insurance Company, at the rate of five pounds per centum per annum, then such amount of unpaid interest shall at each of said terms be accumulated with the said principal debt or balance remaining due thereof, and the whole as a principal sum shall bear interest at the said rate until the same shall be paid up out of rents subsequently received, or the prices of lands sold : In the FOURTH place, in the event that my said trustees, in the course of their ma-

4. Trustees empowered to obtain a

further temporary advance.

nagement of the said estate, shall consider it necessary or advisable to obtain a further temporary advance of money, for the better and more advantageous arrangement of my affairs, until sales shall have been effected to the full extent necessary for the fulfilment of the trust purposes, it is hereby declared that it shall be competent to my said trustees, and they are hereby empowered, to obtain a further advance of money, on the security of the said estates, from the said

Insurance Company, to an extent not exceeding L. of principal; which further advance shall rank *pari passu* with the foresaid sum of L. already advanced or about

5. Allowance to the truster.

to be advanced by the said Insurance Company, and shall be secured and be repayable, with interest and penalties, in the same way and manner as the said sum of L. : In the FIFTH

6. Sale of whole estate for liquidation of debts.

place, for payment of such an allowance to me, during the subsistence of the trust, as my said trustees, having regard to the amount of interests annually exigible, the amount of debts payable out of the said estates, and other circumstances connected with the trust affairs, shall in their own judgment and discretion deem right and proper: In the SIXTH place, I hereby authorize, empower, and direct my said trustees forthwith to bring to sale the whole lands and estates hereby conveyed, and after advertisement thereof, in such way as they may deem best calculated to effect an advantageous sale, of which they shall be the sole judges, to sell and dispose of the said lands, in whole or in part, by public roup or private bargain, as they may consider most beneficial, and at such price or prices as can be obtained for the same, and to take all proceedings and execute all deeds which may be necessary for giving full effect to the said sale; and in the event of the said lands being sold, and of any sale thereof not being implemented, I give full power to my said trustees to rescind any such sale, and also to re-expose the said lands, in whole or in part, until the purposes of the trust shall have been fully accomplished; AND for the purposes aforesaid I hereby nominate, constitute, and appoint the said

Grant of power of attorney to the trustees.

and , and the acceptor or survivor of them, and the trustee or trustees to be assumed in manner foresaid, to be my commissioners and attornies or commissioner and attorney, irrevocably appointed to act in all matters and particulars relating to or concerning the said intended sale, with power to them or him to

enter into minutes of sale, articles of roup, and prorogations thereof, and specially to grant, subscribe, and deliver a disposition or dispositions of the said lands and estates so to be sold in favour of the purchaser or purchasers, and all other necessary deeds and conveyances connected with or requisite in the premises, and containing all the usual and proper clauses, agreeably to the laws and practice of Scotland in the like cases; And which deed or deeds so to be executed by my said commissioners or commissioner shall be equally effectual to all intents and purposes, and equally binding and obligatory upon me, my heirs and successors, as if subscribed by myself; And I do accordingly oblige me and my foresaids to ratify and confirm the same in every respect and particular; with power to my said trustees to receive and discharge the price or prices of the lands so sold, or to take such security for payment thereof as they shall think proper, and generally to do every other act or deed in carrying out the said sale which shall be necessary or proper, or which I could do myself, the purchaser or purchasers being in no way concerned with or bound to see to the application of the price or prices: In the SEVENTH place, I appoint and ordain that my said trustees, so soon as the whole or any part of my said estates shall have been sold and the prices thereof received, or so soon as there shall be sufficient trust funds from the sale or realization of any part of my personal estate, and after payment of trust expenses and of the interest due at the time on the before mentioned heritable debts, forthwith to proceed to pay off and obtain discharges of the principal sums of the said heritable debts, including the foresaid sum of L. to the said Insurance Company, and that to the extent of the trust funds then in hand, and according to the respective rights of preference among the said heritable creditors, or in such other order as may be agreed to among the said creditors themselves; and so forth from time to time, as successive sales or realization of funds shall take place, and until the whole of the said heritable debts, principal, interest, and expenses shall have been fully paid and extinguished; And after payment in full of the said heritable debts, then my said trustees shall apply the remainder, or as much as may be requisite, of the said trust funds in payment of the said unsecured debts due by me to _____ and _____, with all interest which may be due upon the said debts, and all expenses

Purchasers not to see to the application.

7. Application of the proceeds
Payment of heritable creditors according to their preferences.

Payment of unsecured debts.

which may have been incurred in connection therewith, and for the payment of which I am legally liable; And in the event of the reversion of my said estates, heritable and personal, hereby conveyed, after payment of the preferable debts first before enumerated, and expenses of the trust, and all obligations undertaken by my said trustees in the execution of these presents as herein-before specified and authorized, not being sufficient for payment of the said unsecured debts due to the said and , then I appoint my said trustees to divide such reversion or surplus between the said and in proportion to the amount of their said respective debts, interest, and expenses: IN THE LAST PLACE, my said trustees shall be bound and obliged, as by acceptance thereof they bind and oblige themselves and those to be assumed by them in virtue hereof, after the whole purposes of this trust, as herein-before specified, shall have been fulfilled and discharged, to account to me for their actings and intromissions in virtue hereof; and shall further be bound, in the event of my requiring them to do so, to lay their whole accounts of business incurred by them to professional men employed by them before the Auditor of the Court of Session for taxation, whose report thereon, interim or final, shall be binding on me and my successors; and in so far as relates to the accounts of intromissions and cash transactions, the same shall be submitted for audit, in the event of my so requiring, to accountant in , whom failing, to accountant in , and declaring that the report by such accountant shall be final and binding on me and my successors; AND my said trustees shall be bound and obliged, as they by acceptance hereof bind and oblige themselves, to pay over to me, my assignees or successors, any balance which may be due on said accounts of intromissions as the same may be fixed by the said report, and also to reconvey to me any part or portion of the said estates, heritable or moveable, which may not have been sold and disposed of for the purposes foresaid: AND for the more effectual accomplishment of the foresaid purposes, I hereby give full power to my said trustees, acting for the time in the trust hereby constituted, to make up and complete in my person, or in the persons of themselves as trustees foresaid, all proper titles to the lands and estate before disposed, or to any part or parts of the same, whereof

Trustees bound
to account to
the trustee.

Taxation of
accounts.

Payment and
reconveyance
of the rever-
sion.

Grant of special
powers.

Power to com-
plete titles.

the titles may be incomplete, and to have me served heir to any of my ancestors, and to procure me or themselves infeft and seised in any part of the said whole lands and estates, and to obtain the full right thereto vested in their persons as trustees foresaid, and to grant and receive all deeds which may be necessary for these purposes : AND in order that the title to the said lands or any of them may be the more readily made up and completed in the person either of myself or my said trustees, I hereby specially and irrevocably make and constitute the said and , conjunctly and severally, my lawful procurators for me, and in my name to obtain me served and retoured heir to or any of my deceased ancestors or collateral relatives, through whom my title to the said lands and estates, or any part of them, falls to be made up ; And for that purpose, I do hereby authorize my said procurators to present petitions to the Sheriff of Chancery, Sheriff of Edinburgh, or Sheriff of the shire in which the lands lie, and to sign the same on my behalf, as heir in general or of provision, or heir in special, as the case may be, and to carry out the proceedings in such services, and to take out, purchase and obtain all necessary charters, infeftments, decrees of service, retours or others, in the same manner, and as fully and freely in all respects, as I might do myself ; Ratifying hereby and confirming whatever my said procurators shall lawfully do or cause to be done in the premises : WITH FULL POWER also to my said trustees, if they shall consider it advisable for the interests of the trust, to let the mansion house of either furnished or unfurnished, and the shootings on the said estate, for such period and at such rents as they may consider necessary and proper ; to cut down and thin, or to sell and dispose of, the woods and plantations growing upon the said lands and estate, so far as not prejudicial to the amenity of the said lands ; to work and raise all metals, minerals, and stones within the bounds of the said lands, and to execute and authorize any works which may be necessary for that purpose ; to output and input tenants, and to grant leases of the lands and other heritages before disposed for such duration as they may think right, and of the mines, metals, minerals, and stone quarries therein, or any part or parts thereof, fisheries or fishings belonging or attached to the said lands, upon such terms and conditions, and for payment of

Procuratory
to trustees to
obtain truster
served.

Power to let
the mansion
house and
shootings ;

to cut timber ;

to work mine-
rals ;

to lease the
lands, mine-
rals, etc. ;

such rents or lordships, as my said trustees may think proper ; to

to abate rents ; grant such temporary or permanent abatements of rents as in the circumstances shall appear to my said trustees to be necessary ; to

to compound ; to refer ; to pursue and defend. compromise, compound and transact, submit and refer, prosecute and defend all claims, of whatever description, made by me against third parties, or at the instance of third parties, in relation to my said estates, and generally to do everything in the premises which I could have done myself before granting hereof, and all of which

Special powers to redeem rent-charges. I bind and oblige myself to ratify and confirm ; with power also to redeem the rent-charges affecting the said lands and estate in whole or in part, and also to enter and receive vassals in all lands or other heritages holden or to be holden of me as superior thereof, and to grant all charters, precept of *clare constat*, or other writs that may be necessary ; as also to remove and appoint, by deed of

Power to remove and appoint factors and agents. factory or otherwise, any factor and commissioner or factors and commissioners, attornies, agents and cashiers under them, for carrying into execution any of the purposes of this trust, with or without cautioners for their intromissions, with such reasonable salaries or other remuneration for their trouble as the said trustees may consider just and proper : DECLARING hereby that my said trustees shall not be personally responsible for the solvency, or management, or intromissions of any of the said factors, attornies, agents, or cashiers, nor for one another, nor for the solvency of any bank in which the funds of the trust may be deposited, but only for their individual intromissions with my said estate ; and it is hereby specially

Indemnity clause. PROVIDED and DECLARED, that in the event of the said trustees hereby appointed accepting of the said trust, they shall be at full liberty to resign the same on giving to me three months' notice of their intention, by letter addressed to me or to my known agent in Scotland, and transmitted through the General Post Office ; but the resignation or death of any of the said trustees shall not prejudice the operation of this trust, which shall subsist to the full effect herein specified, and until the whole purposes shall have been accomplished, though only one of the said trustees shall accept and survive and act, and who shall be entitled and bound to assume

Power to resign. additional trustees in virtue of the power hereby conferred, with the whole rights, privileges, powers, and immunities conferred on the trustees hereby appointed, and to carry out the purposes of the

Sole trustee bound to exercise power of assumption.

trust upon the terms hereof; BUT DECLARING, that if all the trustees hereby named or to be assumed or appointed, or the last acceptor or survivor of them, shall die or resign and denude without appointing a successor or successors, then the said

Power to creditor to appoint new trustees.

Insurance Company shall be entitled, and they are hereby authorized and empowered so long as the foresaid debt to them, or any part thereof, shall be unpaid, by any deed to be granted by their manager or directors, to nominate another trustee or trustees for the purpose of carrying out and completing the whole purposes for which the present trust disposition is granted, and with the whole powers, privileges, and immunities hereby conferred on the trustees before appointed: AND I hereby BIND and OBLIGE myself and my heirs and successors to grant all deeds and writings of every description that may be necessary or proper for fully vesting the whole trust estate hereby conveyed, either in the persons of the trustees hereby nominated, or of the trustees to be assumed or otherwise appointed as aforesaid; it being hereby declared, that notwithstanding the death or denuding of all or any of the said trustees, the trust hereby constituted shall nowise cease or become void thereby, but this present trust, and the real rights created under the same and in virtue hereof, and all that may follow hereupon, shall stand and subsist as a security to my said creditors, including the Insurance Company, so long as the debts due to them as aforesaid, or any part thereof, shall remain unpaid: AND it is hereby expressly CONDITIONED and DECLARED that the said original trustees, and their successors in office, shall be BOUND and OBLIGED to exhibit to the said Insurance Company, for the information of the said company and of my other creditors, and that annually, or as often as they shall be required so to do, full states of the trust affairs, containing an account of their whole receipts and payments connected with the trust, as well in the management of the said lands and estates as with sales thereof, and payments made to the said creditors or others out of the rents and prices or other proceeds of the trust estates, with such other information as may be necessary fully to inform my said creditors as to the trust management and the position of the trust at the time. [Insert a clause revoking and recalling any previous trust that may be in operation, and provision for payment of expenses under it.] All

Truster bound to convey to new trustees.

Trust not to lapse till purposes are fulfilled.

Trustees bound to exhibit accounts to the creditors,

and to give information.

Revocation of previous trust.

Clause of Direction.

which conditions, provisions, declarations, purposes, and powers herein contained, shall be duly recorded in the General Register of Sasines, whereby the real right to the said lands is to be constituted in the persons of the said trustees, and shall be inserted or validly referred to in all future rights in favour of them or their successors in office, but shall not be inserted in the rights or dispositions to be granted in favour of the feuars or purchasers of the said lands,

Feudal clauses.

or others deriving right from the said trustees: WITH ENTRY to the said lands and estates, and possession of the said personal estate, immediately on the execution hereof; and I RESIGN the said lands and others for new infeftment, but always in trust only, and for the uses, ends, and purposes, and with and under the conditions, provisions, declarations, and powers before written; And I ASSIGN the writs, title deeds, and leases of the said lands and others; and I ASSIGN the rents; and I GRANT warrandice; and I CONSENT to registration hereof for preservation and execution, and also to registration in the General or Particular Register of Sasines.—In witness whereof, etc.

No. XIV.—*Trust Disposition omnium bonorum for behoof of Creditors. Concise Form, containing Provision for Trustees' Discharge, and power to apply for Sequestration.*

Dispositive clause.

I, A. B., Merchant in _____, considering that I am indebted and owing to different parties various sums of money, and that my circumstances have become embarrassed, and seeing that with the view of my means and effects being distributed among my creditors according to their respective rights and interests, I have resolved to grant these presents in manner under written: THEREFORE, I do hereby DISPONE, ASSIGN, and CONVEY to and in favour of A. B., accountant in _____, whom failing by death, incapacity, resignation, or otherwise, to C. D., accountant there, as trustees to act in succession in manner after written for behoof of all my just and lawful creditors, as at the date hereof, my whole estate and effects, heritable and moveable, real and personal, presently belonging and owing to me, or which may belong and be owing to me, or to which I may acquire right during the subsistence of this trust, and particularly, without prejudice to the said generality, my whole stock-in-trade, shop-fittings, and the whole debts due and owing to me, with

the whole writs, vouchers, and instructions thereof, and all that has followed or may follow thereupon, and my whole right and interest therein, present and future; BUT DECLARING that these presents are granted by me, and shall be accepted in trust, for the uses, ends, and purposes, with the powers and under the conditions, provisions, and declarations after written; viz., That my said estate, and prices and proceeds thereof, shall be held and applied by the acting trustee for the security and payment of the debts due to all my just and lawful creditors, as at the date hereof, according to their several rights and preferences; and for that end, that the acting trustee shall, as speedily as may appear to him expedient, sell and dispose of my whole estate, including my said stock-in-trade, shop-fittings, and other effects, and that either by public roup or private bargain, as he may think proper, and either in whole or in lots, as to him may appear most advisable, and realize all the debts which may be owing to me; and the said trustee shall apply my said estates and the proceeds thereof as follows: viz., IN THE FIRST PLACE, for payment of the expenses attending the creation and execution and the management of the trust, including a suitable remuneration to the acting trustee, and for payment to the said trustee of all advances made or obligations undertaken by him in execution of the trust: SECONDLY, for payment to my creditors at the date hereof of their several debts, and interest thereon, according to their preferences, and conform to a division to be made and authorized by the acting trustee; providing always that the creditors shall be ranked and preferences admitted only in the same manner and to the same extent as if my estates had been sequestrated under the Bankrupt Statutes at the date of the execution of these presents; and declaring that each creditor shall, if required, depone to the verity of the debt, and assign the said debt to the extent of the sums received at the expense of the trust estate to the acting trustee and the other trustees in their order, or to any person whom the acting trustee may appoint: AND DECLARING, that in the event of any of my creditors declining to accede to the trust hereby created, the said trustee is hereby authorized on my behalf to apply for sequestration of my estates under the Bankrupt Statutes; AND FURTHER PROVIDING, that when any division is to be made of the funds, the acting trustee shall give notice of the time of payment to all the

Declaration of trust.

Direction to sell.

1. Payment of expenses.

2. Payment of creditors according to the order of their preferences.

Trustee authorized to apply for sequestration.

Notice.

Consignation
of dividends.

Accession to be
equivalent to
discharge of
trustee; ac-
ceptance of
dividends to
discharge the
trustee.

Powers.

Indemnity
clause.

creditors claiming by circular letters; and if any of the said creditors shall neglect to demand or shall refuse payment of their share of the trust funds, and shall refuse to grant the conveyances, discharges, or other writings which the said trustee shall lawfully require, or if any of the said creditors shall be legally incapacitated to receive such payments, then the said trustee shall have full power, after the expiration of three months from the time of payment to be fixed, either to consign in his own name the dividends of such creditors in any chartered bank for behoof of the parties entitled thereto, or to apply the same in payment of the debts due to the other creditors, reserving to the creditors so refusing their claims for the said dividends out of the first and readiest of the trust funds which may be afterwards realized; DECLARING that the acquiescence in or accession to this trust deed, by any of my said creditors, shall import a discharge by them in my favour of all debts, sums of money, and obligations due and owing by me to them or any of them at and prior to the date of these presents, AND that acceptance of payment or of a final dividend by any of my creditors acceding as aforesaid, shall import a discharge by them to the acting trustee of his intromissions with the funds and estate hereby conveyed: AND I GRANT FULL POWER to the acting trustee to appoint law agents under him for any of the purposes of this trust, and to allow them a suitable remuneration; AND also to COMPOUND and TRANSACT, or to SUBMIT to arbitration, all questions and disputes arising in his management, or in connection with the estate hereby conveyed: AND DECLARING, as it is hereby PROVIDED and DECLARED, that the said trustee acting in the trust hereby created, shall not be obliged to do diligence otherwise than as he shall think fit, nor shall he be liable for omissions, but for his own actual intromissions only, nor shall he be liable for factors, nor for the insolvency of bankers, debtors, purchasers, cautioners, and others, further than that such persons were habit and repute responsible at the time they were entrusted: AND I BIND and OBLIGE myself and my foresaids to warrant the above written conveyance and these presents at all hands and against all mortals: AND I CONSENT to the registration hereof in the Books of Council and Session, or others competent, therein to remain for preservation, and that letters of horning and all other execution necessary may pass

hereon on a charge of six days, and thereto constitute

my

procurators.—In witness whereof, etc.

No. XV.—*Form of Trust Disposition for purposes to be afterwards declared. Destination over to Truster's personal Representatives.*

I, A. B., of X., do hereby GIVE, GRANT, ASSIGN, CONVEY, and General conveyance.
DISPONE to and in favour of

, as trustees for the purposes after mentioned, and to such other persons as may hereafter be nominated by myself or lawfully assumed by my trustees, and to such of my said trustees as shall accept, and to the survivors or survivor of those accepting, and to the heir of the last surviving trustee, a majority of my accepting and surviving trustees resident in Great Britain for the time being always a quorum, and to the assignees of my said trustees or their foresaids, my whole estate, both heritable and moveable, real and personal, of whatever description, presently belonging to me, or which shall belong to me at the time of my decease: Powers. WITH FULL POWER to my said trustees and their foresaids, so far as not otherwise directed by me, to sell my trust estate by public auction or private bargain, to grant conveyances thereof, and to receive the prices thereof, hereby discharging purchasers from all responsibility as to the application of the price or prices: AS ALSO, with power to uplift, sue for, and discharge all debts due to me, for the application of which the debtors shall not be answerable; AS ALSO, to pursue and defend, or to compound, transact, or refer all questions affecting my trust estate; AS ALSO, to grant feus and let leases of my heritable property; AS ALSO, to enter vassals; AS ALSO, to name factors and agents, for whom they shall not be answerable further than that they were habit and repute responsible at the time of their appointment; And in general with the fullest powers to manage my whole trust affairs as freely as I might have done myself, and against all mortals: AND I hereby BIND and OBLIGE me and my foresaids to make this conveyance effectual, when required, by completing titles in our own persons, and granting special conveyances in implement thereof to my said trustees and their foresaids: But these presents are granted in trust for the

Purposes of the
Trust.

ends, uses, and purposes following, viz.: **IN THE FIRST PLACE**, for payment of my just debts and funeral expenses, and the expenses of this trust, and for fulfilment of all obligations incumbent on me: **SECONDLY**, for the payment of such legacies as I may bequeath by any writing under my hand, though found in my repositories, or in the custody of any third party undelivered at the time of my death: **And THIRDLY**, for payment, delivery, and application of the whole residue of my said estate, both heritable and moveable, real and personal, or the proceeds thereof, in so far as the same may have been sold, or otherwise realized in the manner to be directed or pointed out by any writing under my hand, whether in the form of a deed, or of a letter, to be addressed by me to my said trustees or otherwise, and whether the same shall be found in my repositories at the time of my decease, or in the custody of any person to whom I may have entrusted the same; and in default of my leaving such direction in writing, then to convey, dispense, deliver, and pay over my said whole residuary estate, heritable and moveable, to my nearest personal representatives: [*If the destination be to "heirs and assignees," the heir's right of challenge in relation to any codicil or letter of instructions will subsist, notwithstanding the general conveyance to trustees.*] **AND FURTHER**, I do hereby **NOMINATE**, **CONSTITUTE**, and **APPOINT** my said trustees and their foreshaids to be my sole executors and universal intromitters with my moveable means and estate, with all the powers competent to executors; **AND I RESERVE** my own liferent of the premises, and full power to alter and revoke these presents in whole or in part; **AND I DISPENSE** with the delivery hereof, and of all writings made in relation hereto, and declare that the same shall be effectual although found in my custody, or in the custody of any other person to whom I may have entrusted the same at the time of my death; **AND I CONSENT** to registration for preservation, and to that effect I constitute

my

procurators.—In witness whereof, etc.

SECTION V.

MISCELLANEOUS DEEDS.

No. XVI.—*Deed of Assumption by accepting and surviving Trustees and Executors, containing a Special Conveyance of the Trust Estate to the original and assumed Trustees.*

We, C. D. and E. F., the only accepting and surviving trustees and executors under the disposition and deed of settlement of the deceased A. B. of Y., dated _____, and codicil thereto dated _____

Narrative.

: CONSIDERING THAT, by the said disposition and deed of settlement, the said A. B., with and under the declaration of trust, and exceptions and reservations therein expressed, gave, granted, and disposed to and in favour of us, the said C. D. and E. F., and of M. N. of O., and P. Q. of R., and of the acceptors and acceptor, survivors and survivor of us and them, and of such other persons as might thereafter be named by the said A. B. by any writing under his hand, or as might be assumed by virtue of the powers therein granted for that effect, and to and in favour of the heirs of the last survivor acting in virtue thereof, or in virtue of any appointment to be made by him or under authority thereof, but in trust always for the ends, uses, and purposes therein specified, and to the assignees or disponees of the said trustees or trustee, All and Whole the heritable subjects hereinafter described and disposed; and also (under the exceptions hereinafter mentioned), All and Sundry other lands, teinds and heritages, debts and sums of money heritably secured, and in general the whole real estate then pertaining to the said A. B., or which should be pertaining to him at the time of his death; EXCEPTING ONLY the lands and barony of _____, belonging to him, contained in a deed of entail executed by him on the _____; and also

Recital of the trust conveyance. Heritable estate,

and exceptions therefrom;

the other lands and estates which he had entailed, of even date with the execution of the said trust disposition and deed of settlement, or which he might thereafter settle by entail; together with all contracts of sale, charters, dispositions, adjudications,

also the conveyance of the truster's personal estate;

the nomination of executors, and sundry usual clauses;

particularly a power of assumption.

precepts and instruments of sasine, tacks and other writs and evidents, rights, title deeds, and securities of and concerning his said real and heritable estate thereby disposed and conveyed; AND IN LIKE MANNER, the said A. B., with and under the declaration of uses and reservations thereafter contained, gave, granted, assigned, transferred, conveyed, and made over to and in favour of us, the said C. D. and E. F., and the said M. N. and P. Q., in trust for the ends, uses, and purposes thereafter specified, and to the acceptors and acceptor and survivors and survivor of us and them, and to such other person or persons as might thereafter be named by him, or as might be assumed as aforesaid, and the assignees of said trustees or trustee, the whole personal or moveable estate, goods, funds, and effects, wheresoever situated, then pertaining or belonging to him, or which should pertain or belong to him at his decease; AND HE THEREBY gave, granted, and committed to the trustees therein named, and the acceptors and acceptor and the survivors or survivor of them, and to the person or persons who might be named or assumed, the powers and authorities therein mentioned; and he thereby nominated and appointed us, the said C. D. and E. F., and the said M. N. and P. Q., and the trustees to be nominated, or such of us and them as should accept of the trust thereby constituted, and the survivors or survivor of us and them, to be his executors or executor, and the only intromitters or intromitter with his personal or moveable estate, goods, and effects, excluding and debarring all others from the said office; AND HE THEREBY GRANTED and committed unto us, the said C. D. and E. F., and the said M. N. and P. Q., and the acceptors or acceptor and the survivors and survivor of us and them, full power and authority from time to time, and whensoever we and they should think fit, to nominate and appoint by a writing under our and their hand any person or persons as we should think proper to the office of trustee and executor under the said disposition and deed of settlement, along with ourselves and themselves, or after our or his decease, which person or persons so to be assumed should have the same powers, privileges, and immunities in every respect, in relation to the offices thereby conferred, as if the said person or persons had been nominated by the said disposition and deed of settlement; and he declared that the major part of the

said trustees therein named and to be assumed, surviving and accepting, residing in Great Britain at the time should be a quorum; and he thereby declared that the said disposition and deed of settlement was granted in trust only, and for the ends, uses, and purposes therein mentioned, as the said disposition and deed of settlement, containing various powers, privileges, and exemptions, and sundry other clauses, in itself more fully bears; AND WHEREAS, by the said codicil to the said disposition and deed of settlement, the said A. B. recalled the appointment of the said M. N. as a trustee and executor under his settlement, and nominated and appointed V. W. of X., now deceased, to be a trustee and executor in his place, as the said codicil in itself more fully bears; AND WHEREAS the said A. B. deceased upon the

Recital of codicil to foregoing trust settlement, recalling appointment of one of the trustees.

Decease of trustor, and acceptance by certain of the trustees.

day of
 , and we, the said C. D. and E. F., thereupon accepted of the office of trustees and executors conferred upon us by the said disposition and deed of settlement and codicil, the said P. Q. having declined to accept thereof, and we thereupon entered into possession of the estates and effects thereby conveyed, and have since continued to manage the same, in terms of the said disposition and deed of settlement; AND WHEREAS we have agreed to nominate and assume J. K. and J. L. to be trustees along with us under the said disposition and deed of settlement, and to dispoise and convey to ourselves and to them the subjects and estate, heritable and moveable, of the said deceased A. B., conveyed to us by the said disposition and deed of settlement; AND NOW SEEING that for the purpose of assuming the said trustees, and so conveying the said subjects, it is necessary to execute these presents in manner under written: THEREFORE we, the said C. D. and E. F., accepting trustees and executors foresaid, the major number of us being a quorum, DO hereby, in virtue of the powers conferred on us by the said disposition and deed of settlement, NOMINATE, ASSUME, and APPOINT the said J. K. and J. L., the survivor and acceptor of them, to be trustees and trustee along with us, and the survivors and survivor of us, under the said disposition and deed of settlement and codicil, in the management of the heritable subjects and estates of the said deceased A. B.; DECLARING, in terms of the said disposition and deed of settlement, that the trustees hereby nominated and appointed shall be entitled to the whole powers, privileges, im-

Resolution to assume additional trustees, and to execute conveyance.

Subsumption.

Nomination and assumption of additional trustees.

Declaration of powers, etc.

Disposition of
the trust estate
by the original
trustees to
themselves
in conjunction
with the new
trustees.

Heritable
estate.

Personal
estate.

munities, and others conferred by the said disposition and deed of settlement on the trustees and executors thereby named: AND IN ORDER that we and they may be vested in the said heritable subjects and estates, WE, the said C. D. and E. F., have ASSIGNED, DISPOSED, AND CONVEYED, as we do hereby ASSIGN, DISPOSE, CONVEY, and MAKE OVER to and in favour of ourselves, the said C. D. and E. F., and of the said J. K. and J. L., and the survivors and acceptors and the survivor and acceptor of us and them, and to and in favour of the heirs of the last survivor acting in virtue hereof, the major number of the said trustees herein named and to be assumed, surviving and accepting and resident in Great Britain at the time, being a quorum, BUT IN TRUST always for the ends, uses, and purposes specified in the said disposition and deed of settlement and codicil, and to the assignees and disponees of the said trustees and trustee and their foresaids, All and Whole [*here describe any lands which it is wished specially to convey*]: AS ALSO, All and Sundry other lands, teinds, and heritages, debts and sums of money heritably secured, and in general the whole real estate pertaining to the said A. B. at the time of his death; EXCEPTING only from this conveyance the lands and barony of _____, belonging to him, contained in a deed of entail executed by him on the _____ day of April _____, AND ALSO the other lands and estates which he had entailed, of even date with the execution of the said deed of settlement; TOGETHER with all contracts of sale, charters, dispositions, adjudications, precepts and instruments of sasine, tacks, and other writs and evidents, rights, title deeds, and securities of and concerning his said real and heritable estate hereby disposed and conveyed: AND ALSO, All and Sundry personal or moveable debts and sums of money, arrears of rent, feu duties, teind duties and interest, stock in the Government or parliamentary funds, stock in any bank or banking company, and in any other public or private company, horses, cattle, sheep, or other farming stock, crops or farm produce, implements of husbandry, household furniture, plate, printed books, linens, and china, and in general the whole personal and moveable estate, goods, funds, and effects, wheresoever situated, pertaining or belonging to the said A. B. at his decease, vested in our persons, or due or

addebted to us as trustees and executors foresaid, together with all bonds, bills, promissory notes, receipts, accounts, and other vouchers and instructions of his said personal or moveable estate, funds and effects; WITH ENTRY as at the date of the said A. B.'s decease: AND WE OBLIGE ourselves to infett ourselves, the said C. D. and E. F., and the said J. K. and J. L., and our and their foresaids, but in trust always for the uses, ends, and purposes foresaid, and our and their assignees, in the whole lands and other heritages before disposed (except those subjects which are held by the tenure of burgage), to be holden *a me vel de me*, and in the whole subjects before disposed which are held by the tenure of burgage to be holden of her Majesty in free burgage: AND WE RESIGN the said whole lands and other heritages (as well those held in burgage as those not held in burgage) in favour of ourselves and the said J. K. and J. L., and our and their foresaids, for new infettment, BUT IN TRUST always for the uses, ends, and purposes foresaid: AND WE ASSIGN the writs; AND WE ASSIGN the rents: AND WE GRANT warrandice, but that from our own proper and respective facts and deeds only: AND WE CONSENT to the registration hereof for preservation and execution.—In witness whereof, etc.

Entry.

Obligation to infett.

Resignation.

Assignment of writs and rents.

Warrandice.

Registration clause.

NOTE.—A minute or deed of assumption, containing a simple nomination and assumption of new trustees, is a good appointment. It is desirable, however, to have the estate formally vested in the new trustees by conveyance, although it is not necessary to complete a title in their persons until the original appointment has been vacated.

No. XVII.—*Factory and Commission by Trustees, original and assumed, under a mutual Trust Settlement. Power to manage heritable estate, etc.*

We, C. D., E. F., and G. H., CONSIDERING that by mutual deed of settlement, executed by the deceased A. B., and me, the said C. D., dated the day of , and registered in the Books of Council and Session the day of , the said A. B. DISPONED, ASSIGNED, CONVEYED, and MADE OVER to and in favour of me, the said C. D., and my heirs and assignees,

Narrative.

Recital of the mutual trust conveyance to surviving disponent and trustee.

Reciprocal
conveyance.

Recital of
purposes and
powers;

and particu-
larly a power
of assumption.

Decease of one
of the parties,
and acceptance
of trust by the
survivor.

Assumption
of additional
trustees;

subject to the conditions, provisions, and others therein mentioned, All and Sundry lands, tenements, tacks, heritages, debts, heritable and moveable, goods, gear, sums of money, stock-in-trade, and in general the whole subjects and estate, heritable and moveable, real and personal, then owing and belonging to him, or that should be owing and belonging to him at the time of his death, with the whole rents, interest, profits and produce, and writings and title deeds, evidents, vouchers, and securities of the same, and all that had followed or might be competent to follow thereon : AND in like manner, I, the said C. D., DISPOSED, ASSIGNED, CONVEYED, and MADE OVER to and in favour of the said A. B., and his heirs and assignees, subject to the conditions, provisions, and others therein mentioned, All and Sundry the whole subjects and estate, heritable and moveable, real and personal, then owing and belonging, or which should be owing and belonging to me at my death, and the said A. B., and I, the said C. D., appointed the survivor of us to be the sole and only executor and universal intromitter of the first deceiver : AND IT WAS thereby DECLARED that the said subjects and estate of the first deceiver, or prices and proceeds thereof, if sold or realized, should be held and applied in the first place in payment of the whole just and lawful debts, and of the sick-bed and funeral charges of the first deceiver, and in the second place the residue and remainder thereof should be held and applied by the survivor for the purposes and in the manner therein mentioned, as the said mutual deed of settlement, CONTAINING POWER to the survivor of the said A. B. and me, the said C. D., to assume any other person or persons as trustee or trustees along with or in succession to him, in manner therein written, in itself more fully bears : AND WHEREAS the said A. B. having died on the day of , I, the said C. D., thereupon accepted of the office of trustee and executor conferred on me by the said mutual deed of settlement, obtained myself confirmed executor to him, entered into possession of the said trust estate, and sold and realized the moveable estate and effects of the said A. B., at least the greater part thereof, and invested part of the proceeds thereof in heritable property as directed by the said mutual deed of settlement, the titles to which were taken to me as trustee foresaid : AND WHEREAS, in virtue of the powers conferred on me by the said mutual deed of settlement, I,

the said C. D., nominated and appointed us, the said E. F. and G. H., and the acceptors and survivors and acceptor and survivor of us, as trustees and trustee and executor along with me for executing the purposes of the said trust, AND DISPONED to and in favour of us, the said C. D. and G. H., and the acceptors and survivors and acceptor and survivor of us, and to the heirs of the last survivor, as trustees and trustee foresaid, All and Whole the whole heritable and moveable trust funds, estate, and effects of every kind and description vested in me, the said C. D., or to which I was entitled as trustee and executor foresaid, conform to deed of assumption and conveyance, executed by me upon the day of , upon which we are or are about to be infeft: AND WHEREAS we have considered it expedient for the due and proper management of the said trust estate to appoint a factor under us, with the powers and for the purposes under written, and have accordingly resolved to appoint M. N., accountant in , to the said office: AND NOW SEEING that the said M. N. having agreed to accept of the said appointment, AND NAMED P. Q. as his cautioner, with whose sufficiency we are fully satisfied, it is necessary that we should execute these presents in manner under written: THEREFORE WE, the said C. D., E. F., and G. H., do hereby NOMINATE, CONSTITUTE, and APPOINT the said M. N. to be our factor, hereby GIVING, GRANTING, and COMMITTING to him full power and commission for us, and in our names as trustees and executors foresaid, to enter into possession of the trust estate, heritable and moveable, of the said deceased A. B., to realize and convert into money, at such times and in such manner as he shall deem proper, the moveable estate of the said A. B., in so far as not already realized, and to uplift, receive, and discharge the prices and proceeds thereof; to collect, levy, and uplift the feu duties, ground-annuals, rents, maills, and duties, and interest and annual produce of the said heritable estate, vested, or to be hereafter vested, in us as trustees foresaid, and that as well for all arrears of preceding years as for rents yet to fall due during the subsistence of this factory; to let the heritable subjects, or any part thereof, at such rents, for such periods, and on such terms as he may deem proper; to input and output tenants therefrom; to grant, execute, and deliver all receipts, discharges, and acquittances requisite, and to raise, commence, and follow forth all

and conveyance of the trust estate.

Resolution to appoint a factor.

Agreement by factor to accept and to find caution.

Clause of appointment.

Grant of powers.

Factor to
apply rents in
first instance
in payment of
necessary out-
lay, etc.

Net proceeds
to be applied
in payment of
debts.

Surplus to be
applied as
trustees may
appoint.

Money to be
deposited in
bank.

Obligation
by factor to
account.

Obligation by
cautioner.

Factory may
be recalled by
the trustees.

Registration
for execution.

actions, suits, and diligences necessary in the premises, and to appear for and defend us in all actions, suits, and diligences which may be brought against us in relation thereto; TO APPLY the arrears so to be received by him from the said heritable subjects, in keeping the same in repair, in insuring the buildings thereon against losses by fire to such extent as he shall think proper, in paying and defraying the public and parochial burdens, and the feu duties and ground-annuals payable therefrom, and the interest of the debts with which the same or any part thereof may be burdened, and other incidental charges: AND THE BALANCE of the said feu duties, ground-annuals, rents, and others, and the funds arising from the said personal estate, when the same shall have been realized, and the interest and produce thereof becoming due from time to time, shall be applied, IN THE FIRST PLACE, in payment of the just and lawful debts of the said A. B., so far as not already paid; AND IN THE SECOND PLACE, the same shall be paid and applied for the purposes and in the manner to be appointed by us from time to time; AND UNTIL such purposes shall be declared by us, the same shall be deposited in a chartered bank for safety; and in general we hereby give, grant, and commit to our said factor full power to manage, negotiate, and transact the affairs and business foresaid as fully, freely, and effectually as we could do ourselves: Hereby ratifying and obliging ourselves to hold firm all and whatever acts and deeds our said factor shall lawfully do or perform in virtue of these presents: AND IT IS hereby expressly PROVIDED and DECLARED that the said M. N. shall be bound and obliged, as by acceptance hereof he binds and obliges himself, and his heirs, executors, and successors, to hold just count and reckoning with us, as trustees and executors foresaid, for his whole actings and intromissions, in virtue of these presents: AND THE SAID P. Q. hereby BINDS himself, and his heirs, executors, and successors, all jointly and severally along with the said M. N., as cautioners, sureties, and full debtors, for his intromissions with the said trust estate: DECLARING that the factory shall remain in full force and effect until recalled by a writing under our hands, which we hereby expressly reserve full power to ourselves at any time to do: CONSENTING to the registration hereof in the Books of Council and Session, or others competent, therein to remain for preservation, and that all legal execution necessary may pass hereon

on a charge of six days, and thereto constituting

our procurators.—In

witness whereof, etc.

NOTE.—The narrative in this form, as well as in those which precede and follow it, has been varied, so as to exemplify the mode of detailing the circumstances and events, the recital of which is necessary to exhibit the title of the granters.

No. XVIII.—*Discharge and Ratification by residuary Legatees under a Trust Settlement.*

We, E. F., G. H., and M. N. [*names and designations of residuary legatees or beneficiaries*], CONSIDERING THAT by trust disposition and deed of settlement, dated the day of , and recorded in the Books of Council and Session the day of , the now deceased A. B. of X. DISPONED, ASSIGNED, CONVEYED, and MADE OVER to and in favour of P. Q., R. S., T. U., and the acceptors, etc. [*narate the terms of the disposition to trustees, and of any nomination of additional trustees, or recall of a previous appointment, and the leading provisions of the trust, for example,—payment of debts and legacies, liferent annuity to truster's widow, and residuary bequest, with power of advancement*], as the said trust disposition and deed of settlement, containing a nomination by the said A. B. of the said trustees as his executors, and sundry other clauses, in itself more fully bears : AND WHEREAS the said A. B. deceased upon the day of , survived by the said E. B., his widow, and by us, the said E. F., G. H., and M. N.; and the said P. Q., R. S., and T. U. accepted of the offices conferred upon them by the said trust disposition and deed of settlement, and entered upon the possession and management of the means and estate thereby conveyed, and paid the said A. B.'s just and lawful debts so far as claimed or ascertained, and his sick-bed and funeral charges, and the said legacies : AND WHEREAS the said trustees and executors, after payment of the said debts, and sick-bed and funeral charges and legacies, have regularly made payment of the whole annual income and produce of the residue of the means and estate of the said A. B. to E. B., his

Narrative.
Recital of
trust convey-
ance, appoint-
ment of execu-
tors, and lead-
ing purposes of
the trust;

decease of
truster and
acceptance of
trust;

fulfilment of
primary pur-
poses;

widow, up to the term of _____, and the said E. B. died on the _____ day of _____ [narrating what has been already done in fulfilment of the purposes of the trust, as well as the occurrence of the various events, as deaths, the attainment of majority, etc., upon which the distribution of the whole or any part of the succession is dependent]: AND WHEREAS the said trustees and executors have, in virtue of the powers committed to them by the said trust disposition and deed of settlement, advanced to each of us, the said E. F. and G. H., to account of our provisions, L. _____, we paying interest at the rate of five per cent.: AND WHEREAS the said trustees and executors have submitted to us full and accurate accounts of their intromissions with the said estate, and the annual income and produce thereof, FROM WHICH IT APPEARS that the residue of the said means and estate amounts to the sum of L. _____, including the said advances, and the interest and produce so far as not accounted for as aforesaid: AND NOW SEEING that we have examined the said accounts and are satisfied therewith, and the said P. Q., R. S., and T. U., as trustees and executors foresaid, have now or formerly advanced and paid to or accounted for to each of us, the said E. F., G. H., and M. N., the sum of L. _____ (including in the shares of us, the said E. F. and G. H., the sums advanced to us as aforesaid), being our one-_____th part or share of the said residuary fund, amounting as aforesaid to L. _____, of which sums so paid or accounted for, we, the said E. F., G. H., and M. N., do hereby acknowledge the receipt, renouncing all exceptions and objections to the contrary, and that it is just and proper we should execute these presents in manner under written: THEREFORE we, the said E. F., G. H., and M. N., and we all with joint advice and consent, for our several and respective rights and interests, do hereby RATIFY, APPROVE OF, and CONFIRM the whole accounts, and whole actings, transactions, and intromissions of the said P. Q., R. S., and T. U., as trustees and executors foresaid, in and with the said trust funds and estate, and the interest and produce thereof, or in any way relating thereto: AND we do hereby EXONEE, ACQUIT, and DISCHARGE the said P. Q., R. S., and T. U. of their whole actings, transactions, and intromissions, and also their whole omissions at and prior to the date hereof, as trustees and executors foresaid, and of the said sums so paid, as in full to us of our shares of the said residue provided to us by the said trust dis-

and that trustees have advanced portions of their shares of residue to certain of the legatees.

That trustees have accounted for their intromissions.

State of balance.

Subsumption.

That trustees have paid or accounted for the balances due to the respective legatees.

Clause of ratification

and discharge.

position and deed of settlement, including the said interest and produce up to the date hereof, so far as not accounted for as aforesaid; and also of the said trust disposition and deed of settlement itself, whole clauses and provisions therein contained in our favour, and all that has followed or may be competent to follow thereon:

WHICH DISCHARGE AND RATIFICATION we bind and oblige ourselves, for our respective rights and interests, to warrant at all hands and against all mortals, as law will; as also, to free and relieve, and harmless and skaithless keep, the said trustees and executors of, from, and against all debts, expenses, or claims which may be due by or made against them as such trustees and executors to the extent of our several shares and proportions of interest in the estate of the said A. B. as aforesaid: AND WE CONSENT to the registration hereof in the Books of Council and Session, or others competent, therein to remain for preservation, and that all execution necessary may pass upon a warrant or decree to be interponed hereto, on a charge of six days; and thereto CONSTITUTE

Warrandice.

Registration
clause.

our procurators.—

In witness whereof, etc.

Appendix.

4° GEORGH IV. REGIS.

CAP. XCVIII.

An Act for the better granting of Confirmations in Scotland.—[19th July 1823.]

“WHEREAS it is expedient that Provision should be made for the better granting of Confirmations in certain Cases in *Scotland* ;”
Be it therefore enacted by the King’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the passing of this Act, in all Cases of Intestate Succession, where any Person or Persons, who, at the Period of the Death of the Intestate, being Next of Kin, shall die before Confirmation be exped, the Right of such Next of Kin shall transmit to his or her Representatives, so that Confirmation may and shall be granted to such Representatives, in the same Manner as Confirmations might have been granted to such Next of Kin immediately upon the Death of such Intestate.

Right to Confirmation to transmit to Representatives.

II. And be it further enacted, That from and after the First Day of *January* One thousand eight hundred and twenty-four, Caution shall not be required to be found by Executors Nominate; and in all other Cases the Court granting Confirmation shall fix the Amount of the Sum for which Caution shall be found by the Person or Persons to whom Confirmation shall be granted, not exceeding the Amount confirmed.

Court to regulate Caution to be found.

Partial Confirmation to
cease.

III. And be it further enacted, That from and after the First Day of *January* One thousand eight hundred and twenty-four, every Person requiring Confirmation shall confirm the whole Moveable Estate of a deceased Person known at the Time, to which such Person shall make Oath: Provided always, that it shall and may be lawful to eik to such Confirmation any Part of such Estate that may afterwards be discovered, provided the whole of such Estate so discovered shall be added, upon Oath as aforesaid: Provided nevertheless, that nothing herein contained shall affect or alter the Provision made with respect to special Assignations by an Act of the *Scottish* Parliament, made in the year One thousand six hundred and ninety, intituled *Act anent the Confirmation of Testaments*.

Scotch Act,
1690.

In cases of
Executor's Creditor, Confirmation to be
granted.

IV. Provided further, and be it enacted, That in the Case of Confirmation by Executor's Creditor, such Confirmation may be limited to the Amount of the Debt and Sum confirmed to which such Creditor shall make Oath: Provided always, that Notice of every Application for Confirmation by any Executor's Creditor shall be inserted in the *Edinburgh Gazette*, at least once, immediately after such Application shall be made; in Evidence whereof, a Copy of the *Gazette* in which such Notice shall have been inserted shall be produced in Court before any such Confirmation shall be further proceeded in.

18° VICTORIÆ REGINÆ.

CAP. XXIII.

An Act to alter in certain respects, the Law of Intestate Moveable Succession in Scotland.—[25th May 1855.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

The Issue of a

I. In all Cases of Intestate Moveable Succession in *Scotland*

accruing after the passing of this Act, where any Person who, had he survived the Intestate, would have been among his Next of Kin, shall have predeceased such Intestate, the lawful Child or Children of such Person so predeceasing shall come in the Place of such Person, and the Issue of any such Child or Children, or of any Descendant of such Child or Children, who may in like Manner have predeceased the Intestate, shall come in the Place of his or their Parent predeceasing, and shall respectively have Right to the Share of the Moveable Estate of the Intestate to which the Parent of such Child or Children or of such Issue, if he had survived the Intestate, would have been entitled: Provided always, that no Representation shall be admitted among Collaterals after Brothers and Sisters Descendants, and that the surviving Next of Kin of the Intestate claiming the Office of Executor shall have exclusive Right thereto, in preference to the Children or other Descendants of any predeceasing Next of Kin, but that such Children or Descendants shall be entitled to Confirmation when no Next of Kin shall compete for said Office.

predeceasing
Next of Kin
shall come in
the Place of
their Parent in
the Succession
to an Intestate.

II. Where the Person predeceasing would have been the Heir in Heritage of an Intestate leaving Heritable as well as Moveable Estate had he survived such Intestate, his Child, being the Heir in Heritage of such Intestate, shall be entitled to collate the Heritage to the effect of claiming for himself alone, if there be no other Issue of the Predeceaser, or for himself and the other Issue of the Predeceaser, if there be such other Issue, the Share of the Moveable Estate of the Intestate which might have been claimed by the Predeceaser upon Collation if he had survived the Intestate; and Daughters of the Predeceaser, being Heirs Portioners of the Intestate, shall be entitled to collate to the like Effect; and where, in the Case aforesaid, the Heir shall not collate, his Brothers and Sisters, and their Descendants, in their Place, shall have Right to a Share of the Moveable Estate equal in Amount to the Excess in Value over the Value of the Heritage of such Share of the whole Estate, Heritable and Moveable, as their predeceasing Parent had he survived the Intestate would have taken on Collation.

Issue of predeceasing Heir succeeding to the Intestate's Heritage may collate, but other Issue not excluded by his not collating from claiming out of Moveable Estate. Difference between Value of Heritage and Share their Parent would have taken on Collation.

III. Where any Person dying Intestate shall predecease his Father without leaving Issue, his Father shall have Right to One Half of his Moveable Estate, in preference to any Brothers or

Father to succeed to Extent of One Half when no Issue.

Sisters or their Descendants who may have survived such Intestate.

Where Father has predeceased, Mother to succeed to Extent of One Third.

IV. Where an Intestate dying without leaving Issue, whose Father has predeceased him, shall be survived by his Mother, she shall have Right to One Third of his Moveable Estate, in preference to his Brothers and Sisters or their Descendants, or other Next of Kin of such Intestate.

Succession by Brothers and Sisters uterine.

V. Where an Intestate dying without leaving Issue, whose Father and Mother have both predeceased him, shall not leave any Brother or Sister german or consanguinean, nor any Descendant of a Brother or Sister german or consanguinean, but shall leave Brothers and Sisters uterine, or a Brother or Sister uterine, or any Descendant of a Brother or Sister uterine, such Brothers and Sisters uterine and such Descendants in place of their predeceasing Parent shall have Right to One Half of his Moveable Estate.

On a Wife predeceasing her Husband, her Representatives to have no Claim on the Goods in Communion.

VI. Where a Wife shall predecease her Husband, the Next of Kin, Executors, or other Representatives of such Wife, whether testate or intestate, shall have no Right to any Share of the Goods in Communion, nor shall any Legacy or Bequest or Testamentary Disposition thereof by such Wife affect or attach to the said Goods or any Portion thereof.

Not to affect Rights of Spouses on Dissolution of Marriage in certain Cases.

VII. Where a Marriage shall be dissolved before the Lapse of a Year and a Day from its Date, by the Death of One of the Spouses, the whole Rights of the Survivor and of the Representatives of the Predeceaser shall be the same as if the Marriage had subsisted for the Period aforesaid.

Part of Act of Parliament of Scotland, 1617, c. 14, repealed.

VIII. So much of an Act of the Parliament of *Scotland* passed in the Year One thousand six hundred and seventeen, and intituled *Anent Executors*, as allows Executors Nominate to retain to their own Use a Third of the Dead's Part in accounting for the Moveable Estate of the Deceased, is hereby repealed, and Executors Nominate shall, as such, have no Right to any Part of the said Estate.

Interpretation of Terms.

IX. The Words "Intestate Succession" shall mean and include Succession in Cases of partial as well as of total Intestacy; "Intestate" shall mean and include every Person deceased who has left undisposed of by Will the whole or any Portion of the Moveable Estate on which he might, if not subject to Incapacity, have tested;

"Moveable Estate" shall mean and include the whole free Moveable Estate on which the Deceased, if not subject to Incapacity, might have tested, undisposed of by Will, and any Portion thereof so undisposed of.

21° & 22° VICTORIÆ REGINÆ.

CAP. LVI.

An Act to amend the Law relating to the Confirmation of Executors in Scotland, and to extend over all Parts of the United Kingdom the Effect of such Confirmation, and of Grants of Probate and Administration.—[23d July 1858.]

WHEREAS it is expedient to amend the Law relating to the Confirmation of Executors in *Scotland*, and to extend over the United Kingdom the Effect of such Confirmation, and of Grants of Probate and Administration: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. From and after the Twelfth Day of *November* One thousand eight hundred and fifty-eight, the Practice of raising Edicts of Executry before the Commissary Courts in *Scotland*, for the Decerniture of Executors to deceased Persons, shall cease, and it shall not be competent to any Person to obtain himself decerned Executor in virtue of any such Edict raised subsequently to the Date aforesaid.

Practice of raising Edicts of Executry to cease.

II. From and after the Date aforesaid every Person desirous of being decerned Executor of a deceased Person as Disponee, Next of Kin, Creditor, or in any other Character whatsoever now competent, or of having some other Person, possessed of such Character, decerned Executor to a deceased Person, shall, instead of applying, as heretofore, for an Edict of Executry from the Commissary, present a Petition to the Commissary for the Appointment of an

Petition to Commissary to be substituted.

Form of Petition as in Schedule (A.)

Executor, which Petition shall be in the Form as nearly as may be of the Schedule (A.) hereunto annexed, and shall be subscribed by the Petitioner or by his Agent.

To whom Petition to be presented.

III. Such Petition shall be presented to the Commissary of the County wherein the Deceased died domiciled, and in the Case of Persons dying domiciled furth of *Scotland*, or without any fixed or known Domicile, having Personal or Moveable Property in *Scotland*, to the Commissary of *Edinburgh*.

Mode of intimating Petition.

IV. Every such Petition, in place of being published at the Kirk-door and Market Cross, as Edicts of Executry have been in use to be published, shall be intimated by the Commissary Clerk affixing on the Door of the Commissary Court House, or in some conspicuous Place of the Court and of the Office of the Commissary Clerk, in such Manner as the Commissary may direct, a full Copy of the Petition, and by the Keeper of the Record of Edictal Citations at *Edinburgh* inserting in a Book, to be kept by him for that Purpose, the Names and Designations of the Petitioner and of the deceased Person, the Place and Date of his Death, and the Character in which the Petitioner seeks to be decerned Executor, which Particulars the Keeper of the Record of Edictal Citations shall cause to be printed and published weekly, along with the Abstracts of the Petitions for General and Special Services, in the Form of Schedule (B.) hereunto annexed; Provided always, that to enable the Keeper of the Record of Edictal Citations to make such Publication, the Commissary Clerk shall transmit to him the said Particulars, and to enable the Commissary Clerk to grant the Certificate after mentioned, the Keeper of the Record of Edictal Citations shall transmit to the Commissary Clerk a Copy, certified by the said Keeper, of the printed and published Particulars, all in such Form and Manner and on Payment of such Fees as the Court of Session by Act of Sederunt may direct.

Certificate of Intimation of Petition.

V. The Commissary Clerk, after receiving the certified Copy of the printed and published Particulars, shall forthwith certify on the Petition that the same has been intimated and published, in Terms of the Provisions of this Act, in the Form of Schedule (C.) hereunto annexed, and such Certificate shall be sufficient Evidence of the Facts therein set forth: Provided always, that where a Second Petition for Confirmation is presented in reference to the

Additional Intimation of

same Personal Estate, the Commissary shall direct. Intimation of such Petition to be made to the Party who presented the First Petition.

Petition in certain Cases.

VI. On the Expiration of Nine Days after the Commissary Clerk shall have certified the Intimation and Publication of a Petition for the Appointment of an Executor as aforesaid, the same may be called in Court, and an Executor decerned, or other: Procedure may take place according to the Forms now in use in case of Edicts of Executry, and with the like Force and Effect; and Decree Dative may be extracted on the Expiration of Three lawful Days after it has been pronounced, but not sooner: Provided always, that nothing herein contained shall alter or affect the Law as to Executors finding Caution; and that Bonds of Caution for Executors may be partly printed and partly written.

Procedure on Petition.

Decree Dative.

Proviso as to Caution.

VII. Provided always, That nothing herein-before contained shall alter or affect the Course of Procedure now in use before the Commissaries in Confirmations of Executors Nominate.

Not to affect present Procedure.

VIII. Inventories of Personal Estates of deceased Persons and relative Testamentary Writings may be given up and recorded in, and Confirmations may be granted and issued by, any Commissary Court to which it is competent to apply in virtue of the Provisions of this Act for the Appointment of an Executor Dative to the Deceased.

Where Inventories, etc., may be recorded. Confirmations may be granted.

IX. From and after the Date aforesaid it shall be competent to include in the Inventory of the Personal Estate and Effects of any Person who shall have died domiciled in *Scotland* any Personal Estate or Effects of the Deceased situated in *England* or in *Ireland*, or both: Provided that the Person applying for Confirmation shall satisfy the Commissary, and that the Commissary shall by his Interlocutor find that the Deceased died domiciled in *Scotland*, which Interlocutor shall be conclusive Evidence of the Fact of Domicile: Provided also, that the Value of such Personal Estate and Effects situated in *England* or *Ireland* respectively shall be separately stated in such Inventory, and such Inventory shall be impressed with a Stamp corresponding to the entire Value of the Estate and Effects included therein, wheresoever situated within the United Kingdom.

Inventory may include Personal Estate in any Part of United Kingdom.*

X. Confirmations shall be in the Form, or as nearly as may be in the Form, of Schedules (D.) and (E.) hereunto annexed; and

Form and Effect of Confirmations.

such Confirmations shall have the same Force and Effect with the like Writs framed in Terms of the Acts of Sederunt passed on the Twentieth *December* One thousand eight hundred and twenty-three and the Twenty-fifth *February* One thousand eight hundred and twenty-four, or at present in use.

Oaths, before
whom to be
taken.

XI. Oaths and Affirmations on Inventories of Personal Estates given up to be recorded in any Commissary Court may be taken either before the Commissary or his Depute, or the Commissary Clerk or his Depute, or before any Commissioner appointed by the Commissary, or before any Magistrate or Justice of the Peace within the United Kingdom or the Colonies, or any *British* Consul.

Confirmation
produced in
Probate Court
of England,
and sealed,
to have the
Effect of Pro-
bate or Admi-
nistration.

XII. From and after the Date aforesaid, when any Confirmation of the Executor of a Person who shall in manner aforesaid be found to have died domiciled in *Scotland*, which includes, besides the Personal Estate situated in *Scotland*, also Personal Estate situated in *England*, shall be produced in the Principal Court of Probate in *England*, and a Copy thereof deposited with the Registrar, together with a certified Copy of the Interlocutor of the Commissary finding that such deceased Person died domiciled in *Scotland*, such Confirmation shall be sealed with the Seal of the said Court, and returned to the Person producing the same, and shall thereafter have the like Force and Effect in *England* as if a Probate or Letters of Administration, as the Case may be, had been granted by the said Court of Probate.

Confirmation
produced in
Probate Court
of Dublin,
and sealed,
to have the
Effect of Pro-
bate or Admi-
nistration.

XIII. From and after the Date aforesaid, where any Confirmation of the Executor of a Person who shall so be found to have died domiciled in *Scotland*, which includes, besides the Personal Estate situated in *Scotland*, also Personal Estate situated in *Ireland*, shall be produced in the Court of Probate in *Dublin*, and a Copy thereof deposited with the Registrar, together with a certified Copy of the Interlocutor of the Commissary finding that such deceased Person died domiciled in *Scotland*, such Confirmation shall be sealed with the Seal of the said Court, and returned to the Person producing the same, and shall thereafter have the like Force and Effect in *Ireland* as if a Probate or Letters of Administration, as the Case may be, had been granted by the said Court of Probate in *Dublin*.

Probate or
Letters of Ad-
ministration

XIV. From and after the Date aforesaid, when any Probate or Letters of Administration to be granted by the Court of Probate

in *England* to the Executor or Administrator of a Person who shall be therein, or by any Note or Memorandum written thereon signed by the proper Officer, stated to have died domiciled in *England*, or by the Court of Probate in *Ireland* to the Executor or Administrator of a Person who shall in like Manner be stated to have died domiciled in *Ireland*, shall be produced in the Commissary Court of the County of *Edinburgh*, and a Copy thereof deposited with the Commissary Clerk of the said Court; the Commissary Clerk shall endorse or write on the Back or Face of such Grant a Certificate in the Form as near as may be of the Schedule (F.) hereunto annexed; and such Probate or Letters of Administration, being duly stamped, shall be of the like Force and Effect and have the same Operation in *Scotland* as if a Confirmation had been granted by the said Court.

produced in
Commissary
Court, and
certified, to
have Effect of
Confirmation.

XV. In any of the aforesaid Cases where the deceased Person shall be stated in or upon the Probate or Letters of Administration to have been domiciled in *England* or in *Ireland*, as the Case may be, such Probate or Letters of Administration shall, for the Purpose of securing the Payment of the full and proper Stamp Duties, be deemed and considered to be granted for and in respect of the whole of the Personal and Moveable Estate and Effects of the Deceased in the United Kingdom, within the Meaning of the Act of Parliament passed in the Fifty-fifth Year of the Reign of King *George* the Third, Chapter One hundred and eighty-four, and of all other Acts of Parliament granting or relating to Stamp Duties on Probates and Letters of Administration in *England* and *Ireland* respectively; and the Affidavit required by Law to be made on applying for Probate or Letters of Administration in *England* or *Ireland* as to the Value of the Estate and Effects of the Deceased; and also where the Commissary shall in manner aforesaid find that the Deceased was domiciled in *Scotland*, the Inventory required by Law to be exhibited and recorded in the proper Commissary Court in *Scotland* before obtaining Confirmation, or intrmitting with or entering upon the Possession or Management of the Personal or Moveable Estate or Effects of the Deceased in *Scotland*, shall respectively extend to and include the whole of the Personal and Moveable Estate of the deceased Person in the United Kingdom, and the Value thereof; and the Stamp Duties for the Time being

For securing
the Stamp
Duties, Pro-
bates, etc., to
be deemed
granted for all
the Property
in the United
Kingdom.

Inventory to
include all
such Property.

chargeable on Probates and Letters of Administration and on Inventories respectively shall be chargeable upon any Probate or Letters of Administration to be granted, and any Inventory to be exhibited and recorded as aforesaid respectively, for and in respect of the whole of the Personal and Moveable Estate and Effects of the Deceased in the United Kingdom and the Value thereof ; and the said Affidavit shall also separately specify the Value of the said Estate and Effects in *Scotland*.

Provisions of former Acts to apply to the Probates, Letters of Administration, and Inventories mentioned in this Act.

. XVI. For the Purpose aforesaid, and also for granting Relief where too high a Stamp Duty shall have been paid on any such Probate or Letters of Administration, or Inventory, the Provisions contained in Sections Forty, Forty-one, Forty-two, and Forty-three, of the said Act passed in the Fifty-fifth Year of his Majesty King *George* the Third, relating to Probates and Letters of Administration granted in *England*, and the like Provisions in the Act passed in the Fifty-sixth Year of the said King, Chapter Fifty-six, relating to Probates and Letters of Administration granted in *Ireland*, and the Provisions contained in the Act passed in the Forty-eighth Year of the said King, Chapter One hundred and Forty-nine, relating to Inventories in *Scotland*, and also all other Provisions contained in the said Acts respectively, or in any other Act or Acts relating to Probates and Letters of Administration and Inventories respectively, shall apply to the Probates and Letters of Administration to which Effect is given by this Act, and to the whole of the Personal and Moveable Estate of the Deceased for or in respect of which the same shall, in pursuance of this Act, be deemed to be granted, wheresoever situate in the United Kingdom ; and also to the Inventories in which the whole of the Personal and Moveable Estate of the Deceased, wheresoever situate in the United Kingdom, ought, in pursuance of this Act, to be included, in as full and ample a Manner as if all such Provisions were herein enacted in reference to such Probates, Letters of Administration, and Inventories respectively.

Affidavit as to Domicile to be made on applying for Probate or Administration.

XVII. Provided, That in any Case where, on applying for Probate or Letters of Administration, it shall be required to be stated as aforesaid that the Deceased was domiciled in *England* or in *Ireland*, the Affidavit so as aforesaid required by Law shall specify the Fact according to the Deponent's Belief, which shall be sufficient to authorize the same to be so stated in or upon the

Probate or Letters of Administration ; Provided also, that any such Statement, and the Interlocutor of the Commissary finding that the Deceased was domiciled in *Scotland*, shall be Evidence, and have effect for the Purposes of this Act only.

XVIII. It shall be competent to the Court of Session, and they are hereby authorized and required, from Time to Time, to pass such Acts of Sederunt as shall be necessary and proper for regulating in all respects the Proceedings under this Act before the Commissary of *Edinburgh* and other Commissaries in *Scotland*, and following out the Purposes of this Act, and also the Fees to be paid to Agents before the said Courts, and to the Commissary Clerks and other Officers of Court, and the Expense of Publication of Petitions.

Acts of Sederunt to be passed for following out Purposes of this Act.

XIX. All former Acts, and Acts of Sederunt made in virtue thereof, so far as inconsistent with the present Act, are hereby repealed ; and this Act may be amended or repealed by any Act to be passed during the present Session of Parliament, and may be cited as the "Confirmation and Probate Act, 1858."

Former Acts of Sederunt repealed if inconsistent with this Act.

XX. The Word "Commissary" shall include Commissary Depute, and the Term "Commissary Clerk" shall include Commissary Clerk Depute.

Interpretation of Terms.

SCHEDULES to which the foregoing Act refers.

SCHEDULE (A.)

Form of a Petition for Appointment of an Executor to a deceased Person.

Unto the Honourable the Commissary of [*specify the County*], the Petition of A. B. [*here name and design the Petitioner*] ;

Humbly sheweth,

That the late C. D. [*here name and design the deceased Person to whom an Executor is sought to be appointed*] died at [*specify Place*] on or about the [*specify Date*], and had at the Time of his Death his ordinary or principal Domicile in the County of [*specify County, or "furth of Scotland," or "without any fixed Domicile," or "without any known Domicile," as the Case may be*].

That the Petitioner is the only Son and Next of Kin [*or state what other Relationship, Character, or Title the Petitioner has, giving him Right to apply for the Appointment of Executor*].

May it therefore please your Lordship to decern the Petitioner Executor Dative quā Next of Kin to the said *C. D.* [*or state the other Character in which the Petitioner claims to be appointed Executor*].

According to Justice, etc.

[*Signed by the Petitioner or his Agent.*]

SCHEDULE (B.)

Roll of Petitions for the Appointment of Executors in Commissary Courts in Scotland.

County.	Name and Designation of Petitioner.	Title of Petitioner.	Name and Designation of Defunct.	Place and Date of Death.
Edinburgh.	A. B., Writer in Edinburgh.	Next of Kin.	C. D., Merchant in Edinburgh.	No George Street, Edinburgh, 1st Jan. 1857.

SCHEDULE (C.)

Form of Certificate by Commissary Clerk of Publication of a Petition for the Appointment of an Executor.

I, A. B., Commissary Clerk [*or "Commissary Clerk Depute," as the Case may be*], of the County of [*specify County*], hereby certify that this Petition was intimated by affixing a Copy thereof on the Door of the Court-house [*if some other Place has been directed by the Commissary, specify it*], on the [*specify Date*], and by being published by the Keeper of the Record of Edictal Citations at Edinburgh, in the printed Roll of Petitions for the Appointment of Executors in the Commissary Courts of Scotland, printed and published on [*specify Date*].

A. B.

SCHEDULE (D.)

Form of a Testament Dative or Confirmation of the Executor of a Person who has died without naming one.

I, A. B., Commissary of the County of [specify County], considering that by my Decree, dated [specify Date], I decerned C. D. Executor Dative quâ Next of Kin [or other Character, as the Case may be] of the late E. F., who died at [specify Place] on [specify Date], and seeing that the said C. D. has since given up on Oath an Inventory of the Personal Estate and Effects of the said E. F. at the Time of his Death situated in Scotland [or situated in Scotland and England, or in Scotland and Ireland, or in Scotland, England, and Ireland, as the Case may be], amounting in Value to Pounds, which Inventory has been recorded in my Court Books of Date [specify Date], and that he has likewise found Caution for his Acts and Intromissions as Executor : Therefore I, in her Majesty's Name and Authority, make, constitute, ordain, and confirm the said C. D. Executor Dative quâ [specify Character] to the Defunct, with full Power to him to uplift, receive, administer, and dispose of the said Personal Estate and Effects, and grant Discharges thereof, if needful to pursue therefor, and generally every other Thing concerning the same to do that to the Office of Executor Dative quâ [specify Character] is known to belong ; providing always, that he shall render just Count and Reckoning for his Intromissions therewith when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat [specify County], and signed by the Clerk of Court at [specify Place], the [specify Date].

To be signed by the Commissary Clerk or his Depute, and sealed with the Seal of Office.

SCHEDULE (E.)

Form of a Testament Testamentar or Confirmation of an Executor Nominate.

I, A. B., Commissary of the County of [specify County], considering that the late C. D. died at [specify Place], upon [specify Date],

and that by his last Will [*or other writing containing the Nomination of Executor*], dated [*specify Date*], and recorded in my Court Books upon [*specify Date*], the said *C. D.* nominated and appointed *E. F.* to be his Executor, and that the said *E. F.* has given up on Oath an Inventory of the Personal Estate and Effects of the said *C. D.* at the time of his Death situated in Scotland [*or situated in Scotland and England, or situated in Scotland and Ireland, or situated in Scotland, England, and Ireland, as the Case may be*], amounting in Value to

Pounds, which Inventory has likewise been recorded in my Court Books of Date [*specify Date*]: Therefore I, in her Majesty's Name and Authority, ratify, approve, and confirm the Nomination of Executor contained in the foresaid last Will [*or other Writing containing the Nomination of Executor*]; and I give and commit to the said *E. F.* full power to uplift, receive, administer, and dispose of the said Personal Estate and Effects, grant Discharges thereof, if needful to pursue therefor, and generally every other Thing concerning the same to do that to the Office of an Executor Nominate is known to belong; providing always, that he shall render just Count and Reckoning for his Intromissions therewith when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat of [*specify County*], and signed by the Clerk of Court at [*specify Place*], the [*specify Date*].

To be signed by the Commissary Clerk or his Depute, and sealed with the Seal of Office.

SCHEDULE (F.)

I, *A. B.*, Commissary Clerk [*or Commissary Clerk Depute*] of the County of Edinburgh, hereby certify that this Grant of Probate has [*or these Letters of Administration have*] been produced in the Commissary Court of the said County, and that a Copy thereof has been deposited with me.

22° VICTORIÆ REGINÆ.

CAP. XXX.

An Act to amend the "Confirmation and Probate Act, 1858."—
[19th April 1859.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. All Persons and Corporations who, in reliance upon any Instrument purporting to be a Confirmation granted under the "Confirmation and Probate Act, 1858," and all Persons and Corporations who, in reliance upon any such Instrument which may be sealed under the authority of the said Act with the Seal of the Principal Court of Probate in *England* or of the Court of Probate in *Dublin*, and all Persons or Corporations who, in reliance upon any Instrument purporting to be a Probate or Letters of Administration granted by the Court of Probate in *England* or Court of Probate in *Dublin*, and having endorsed or written thereon a Certificate by the Commissary Clerk of *Edinburgh*, in the Form in the said Confirmation and Probate Act prescribed, shall have made or permitted to be made, or shall make or permit to be made, any Payment or Transfer *bona fide* upon any such Confirmation, Probate, or Letters of Administration, shall be indemnified and protected in so doing, notwithstanding any Defect or Circumstance whatsoever affecting the Validity of such Confirmation, Probate, or Letters of Administration.

Persons, etc., making Payments upon Confirmations and Probates under Act 1858 to be indemnified.

II. This Act may be cited as the "Confirmation and Probate Amendment Act, 1859." Short Title.

24° & 25° VICTORIÆ REGINÆ.

CAP. LXXXIV.

An Act to amend the Law in Scotland relative to the Resignation, Powers, and Liabilities of gratuitous Trustees.—[6th August 1861.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

What Trusts hereafter constituted shall be held to include.

I. All Trusts constituted by virtue of any Deed or Local Act of Parliament under which gratuitous Trustees are nominated shall be held to include the following Provisions, unless the contrary be expressed ; that is to say, Power to any Trustee so nominated to resign the Office of Trustee ; Power to such Trustee, if there be only One, or to the Trustees so nominated, or a Quorum of them, to assume new Trustees ; a Provision that the Majority of the Trustees accepting and surviving shall be a Quorum ; and a Provision that each such Trustee shall only be liable for his own Acts and Intromissions, and shall not be liable for the Acts and Intromissions of Co-Trustees, and shall not be liable for Omissions.

Not to affect Liabilities incurred by Trustees prior to Resignation, etc.

II. Nothing contained in this Act shall affect any Liability incurred by any gratuitous Trustee prior to the Date of any Resignation or Assumption under the Provisions of this Act, nor any Action at Law commenced before the passing of this Act.

Construction of the Term "Gratuitous Trustee."

III. A gratuitous Trustee shall, for the Purposes of this Act, be held to be any Trustee who receives no pecuniary or valuable Consideration for performing the Duties of a Trustee, and is under no Obligation, without special Acceptance of such Office, to discharge the Duties of Trustee : Provided always, that nothing in this Act shall extend to any Trustee appointed under the Contract of any Trading Company.

24° & 25° VICTORIÆ REGINÆ.

CAP. CXIV.

An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects.—[6th August 1861.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. Every Will and other testamentary Instrument made out of the United Kingdom by a *British Subject* (whatever may be the Domicile of such Person at the Time of making the same or at the Time of his or her Death) shall as regards Personal Estate be held to be well executed for the Purpose of being admitted in *England* and *Ireland* to Probate, and in *Scotland* to Confirmation, if the same be made according to the Forms required either by the Law of the Place where the same was made, or by the Law of the Place where such Person was domiciled when the same was made, or by the Laws then in force in that Part of her Majesty's Dominions where he had his Domicile of Origin.

Wills made out of the Kingdom to be admitted if made according to the Law of the Place where made.

II. Every Will and other testamentary Instrument made within the United Kingdom by any *British Subject* (whatever may be the Domicile of such Person at the Time of making the same or at the Time of his or her death) shall as regards Personal Estate be held to be well executed, and shall be admitted in *England* and *Ireland* to Probate, and in *Scotland* to Confirmation, if the same be executed according to the Forms required by the Laws for the Time being in force in that Part of the United Kingdom where the same is made.

Wills made in the Kingdom to be admitted if made according to local Usage.

III. No Will or other testamentary Instrument shall be held to be revoked or to have become invalid, nor shall the Construction thereof be altered, by reason of any subsequent Change of Domicile of the Person making the same.

Change of Domicile not to invalidate Will.

IV. Nothing in this Act contained shall invalidate any Will or other testamentary Instrument as regards Personal Estate which

Nothing in this Act to invalidate Wills

otherwise
made.

would have been valid if this Act had not been passed, except as such Will or other testamentary Instrument may be revoked or altered by any subsequent Will or testamentary Instrument made valid by this Act.

Extent of Act.

V. This Act shall extend only to Wills and other testamentary Instruments made by Persons who die after the passing of this Act.

24° & 25° VICTORIÆ REGINÆ.

CAP. CXXI.

An Act to amend the Law in relation to the Wills and Domicile of British Subjects dying whilst resident abroad, and of Foreign Subjects dying whilst resident within Her Majesty's Dominions.—
[6th August 1861.]

WHEREAS by reason of the present Law of Domicile the Wills of *British* Subjects dying whilst resident abroad are often defeated, and their Personal Property administered in a Manner contrary to their Expectations and Belief; and it is desirable to amend such Law, but the same cannot be effectually done without the Consent and Concurrence of Foreign States: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by Authority of the same, as follows:

No British Subject dying in a Foreign Country to be deemed to have acquired a Domicile unless resident there for One Year immediately preceding his or her Death, etc., and for all

I. Whenever her Majesty shall by Convention with any Foreign State agree that Provisions to the Effect of the Enactments herein contained shall be applicable to the Subjects of her Majesty and of such Foreign State respectively, it shall be lawful for her Majesty by any Order in Council to direct, and it is hereby enacted, That from and after the Publication of such Order in the *London Gazette* no *British* Subject resident at the Time of his or her Death in the Foreign Country named in such Order shall be deemed under any

Circumstances to have acquired a Domicile in such Country unless such *British* Subject shall have been resident in such Country for One Year immediately preceding his or her Decease, and shall also have made and deposited in a Public Office of such Foreign Country (such Office to be named in the Order in Council) a Declaration in Writing of his or her Intention to become domiciled in such Foreign Country; and every *British* Subject dying resident in such Foreign Country, but without having so resided and made such Declaration as aforesaid, shall be deemed for all Purposes of Testate or Intestate Succession as to Moveables to retain the Domicile he or she possessed at the Time of his or her going to reside in such Foreign Country as aforesaid.

Purposes of Testate or Intestate Succession shall retain the Domicile possessed at the Time of going to reside in such Foreign Country.

II. After any such Convention as aforesaid shall have been entered into by her Majesty with any Foreign State it shall be lawful for her Majesty by Order in Council to direct, and from and after the Publication of such Order in the *London Gazette* it shall be and is hereby enacted, that no Subject of any such Foreign Country who at the time of his or her Death shall be resident in any Part of *Great Britain* or *Ireland* shall be deemed under any Circumstances to have acquired a Domicile therein, unless such Foreign Subject shall have been resident within *Great Britain* or *Ireland* for One Year immediately preceding his or her Decease, and shall also have signed, and deposited with her Majesty's Secretary of State for the Home Department, a Declaration in Writing of his or her Desire to become and be domiciled in *England*, *Scotland*, or *Ireland*, and that the Law of the Place of such Domicile shall regulate his or her Moveable Succession.

No Foreign Subject dying in *Great Britain* or *Ireland* to be deemed to have acquired a Domicile unless resident therein for One Year immediately preceding his or her Death, etc.

III. This Act shall not apply to any Foreigners who may have obtained Letters of Naturalization in any Part of her Majesty's Dominions.

Who this Act shall not apply to.

IV. Whenever a Convention shall be made between her Majesty and any Foreign State, whereby her Majesty's Consuls or Vice-Consuls in such Foreign State shall receive the same or the like Powers and Authorities as are hereinafter expressed, it shall be lawful for her Majesty by order in Council to direct, and from and after the Publication of such Order in the *London Gazette* it shall be and is hereby enacted, that whenever any Subject of such Foreign State shall die within the Dominions of her Majesty, and

When Subjects of Foreign States shall die in her Majesty's dominions, and there shall be no Persons to administer to their Estates, the Consuls of such Foreign States may administer.

there shall be no Person present at the Time of such Death who shall be rightfully entitled to administer to the Estate of such deceased Person, it shall be lawful for the Consul, Vice-Consul, or Consular Agent of Such Foreign State within that Part of her Majesty's Dominions where such Foreign Subject shall die, to take possession and have the Custody of the Personal Property of the Deceased, and to apply the same in Payment of his or her Debts and Funeral Expenses, and to retain the Surplus for the Benefit of the Persons entitled thereto; but such Consul, Vice-Consul, or Consular Agent shall immediately apply for and shall be entitled to obtain from the proper Court Letters of Administration of the Effects of such deceased Person, limited in such Manner and for such Time as to such Court shall seem fit.

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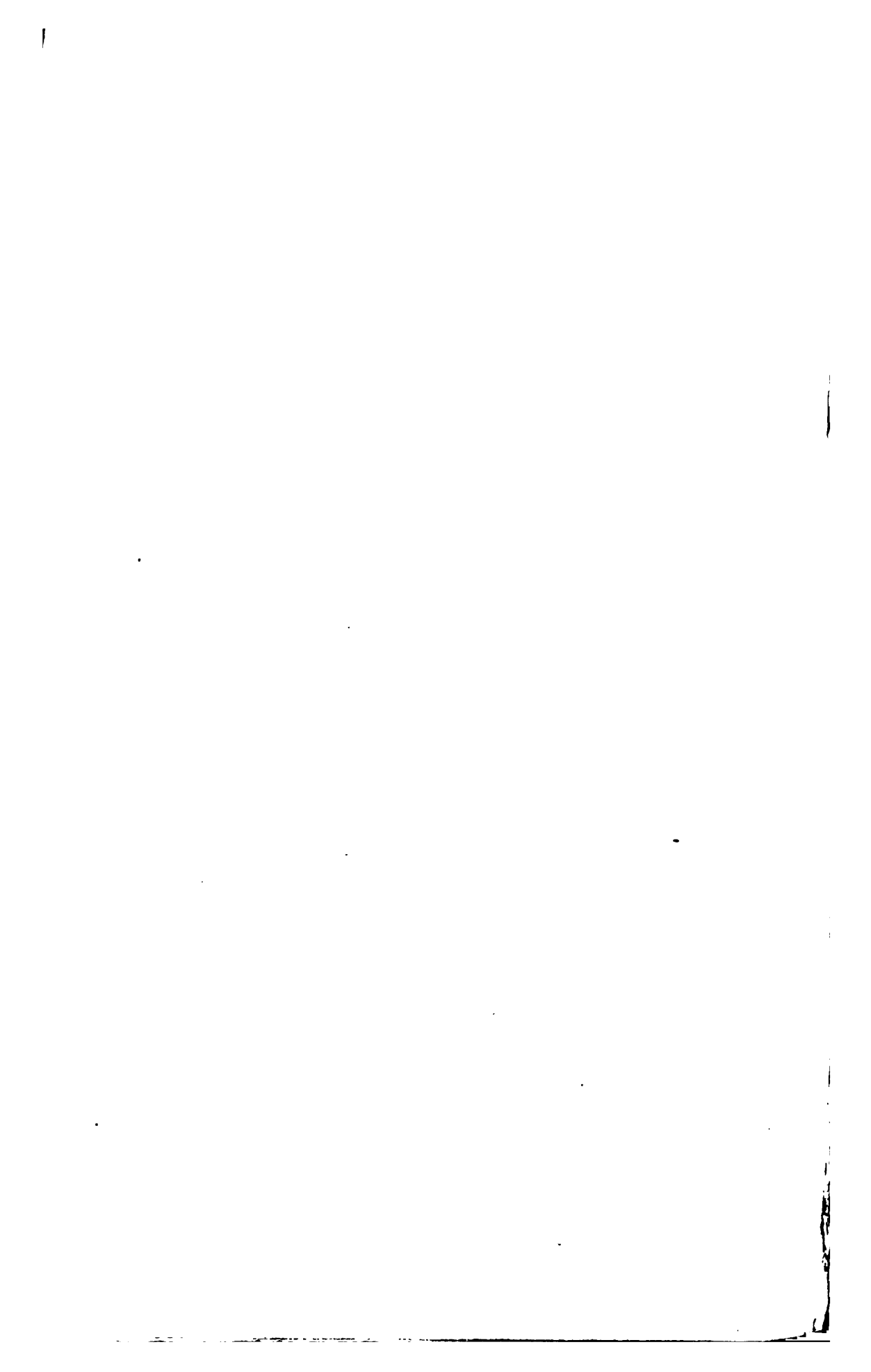
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